Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,
Petitioner,

v.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA,
as Interventor,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on September 24, 1973.

CITATIONS OF OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 345 F. Supp. 527 and reproduced in the Joint Appendix hereto at pp. 41a-75a. The opinion of the United States Court of Appeals for the Second Circuit reversing in part the decision of the District Court is reported at 485 F.2d 1355 and is reproduced in the Joint Appendix at pp. 1a-38a. A petition for rehearing, with suggestion for rehearing *en banc*, was denied on November 14, 1973. A copy of the orders denying rehearing is reproduced in the Joint Appendix at pp. 39a-40a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 24, 1973. A timely petition for rehearing, with suggestion for rehearing *en banc,* was denied on November 14, 1973, and an extension of time to file a petition for a writ of certiorari to and including February 21, 1974, was granted by Mr. Justice MARSHALL on February 7, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

In the absence of competent evidence of any act of the Republic of Cuba, either within or without its territorial jurisdiction, did the mere statements by counsel for the Republic of Cuba that it would not honor Petitioner's claim for the return of money that Cuba never admitted receiving amount to an Act of State by Cuba confiscating the money and thus preventing the courts of this country from fully adjudicating Petitioner's claim on its merits?

Statement of the Case

On September 15, 1960, several manufacturers of Cuban cigars were nationalized by the Republic of Cuba. Before and for a short time after nationalization (or "intervention"), cigars manufactured by these manufacturers were shipped to three principal importers in the United States ("the importers"), including Petitioner. Most of the cigars shipped after intervention were not paid for, but several payments, intended to cover amounts owed for pre-intervention shipments, were made by the importers after intervention.

Lengthy litigation ensued. In early 1961, the former owners ("the owners"), who fled to the United States and elsewhere, sued the importers to obtain payment on all cigars shipped and sued both the importers and the Cuban government for infringing United States trademarks covering the Cuban cigars. The Cuban agents appointed to manage the nationalized businesses, called "interventors", also sought (by attempting to intervene in the owners' actions) to recover for all cigars shipped to the importers.*

The district court resolved the threshold disputes between the interventors and the owners by holding that (1) the owners could prosecute claims for trademark infringement; (2) the owners could recover for pre-intervention shipments; and (3) the interventors could recover for post-intervention shipments. These holdings were affirmed on appeal. *Palicio* v. *Brush & Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967), see J. App., 5a-6a.

During the *Brush & Bloch* litigation, it was assumed that only insignificant post-intervention payments had been made for pre-intervention shipments. Not until the respective rights of the owners and interventors had been established by *Brush & Bloch* did it become apparent that those amounts were substantial. J. App., 43a-44a. It also became apparent that those payments might well have found their way into the hands of the interventors. Since *Brush & Bloch* had determined that the owners were entitled to such payments, the importers, including Petitioner, claimed, *inter alia*, a right to recover against the interventors for any such moneys they might eventually be held to owe the owners.

The interventors' principal line of defense to this claim of the importers was to dispute that they ever received the payments. J. App., 20a-22a and 46a. During the course of trial, as proof was adduced that the interventors received these payments, counsel for the interventors suggested that its client would not honor a claim for repayment of those funds. Apart from counsel's statement, not

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* Jurisdiction was based upon 28 U.S.C. § 1332(a)(2), all parties except the importers being foreign states or citizens or subjects thereof.

a shred of evidence was adduced at trial or before the Court of Appeals to support counsel's contention that any act of the Cuban government had taken place.

After trial, the district court found, *inter alia*, that the payments for pre-intervention shipments had been received by the interventors. The court held that the importers remained liable to the owners for those amounts, with interest, but that the importers could recover those amounts, with interest, from the interventors.* The other two importers, who owed larger sums to the interventors than they had mistakenly paid them, recovered these amounts by way of set-off. Petitioner, having paid more to Cuba for pre-intervention shipments than it owed Cuba for post-intervention shipments, recovered an affirmative judgment against the interventors for the difference. J. App., 73a-75a.

The Court of Appeals for the Second Circuit reversed the holding of the District Court insofar as it granted Petitioner an affirmative judgment, thus requiring Petitioner to pay twice for the same merchandise and allowing the interventors to retain money to which they had been held clearly not entitled. The sole ground for the reversal by the Court of Appeals was that counsel's statements proved that an Act of State had taken place. J. App., 22a-26a. However, under *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), the Court held that the Act of State doctrine would bar consideration of the importers' counterclaims against the interventors only in excess of the amount of the judgments which the Cuban interventors, in turn, had against the importers. J. App., 28a-31a. Thus, the judgment was reversed only as to Petitioner, who alone had an affirmative judgment against the Cuban interventors.

*The award of prejudgment interest was challenged by all importers. Petitioner herein has joined the other importers in seeking review in this Court of that award and other issues. Such review, however, is sought by conditional cross-petition, requesting that the writ issue only if the interventors' petition is granted.

Reasons For Granting The Writ

1. The decision of the Court of Appeals that an Act of State had occurred constitutes a wholly unprecedented expansion of the Act of State doctrine in two significant respects. First, no affirmative step evidencing the exercise of soverign power was taken by any government official. Second, even if such act had occurred, the statements of counsel were not competent to prove any such act.

Every case thus far dealing with the application of the Act of State doctrine has involved an affirmative step taken by a foreign governmental authority within its territorial jurisdiction. Often the affirmative step consists of a formal decree, as in *Banco Nacional de Cuba* v. *First Nat'l City Bank of New York*, 270 F. Supp. 1004, 1009 n. 6 (S.D.N.Y. 1967), *aff'd on final appeal*, 406 U.S. 759, 760 (1972); in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401-05 and nn. 3 and 7 (1964); and in *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 51 (1968). Occasionally (as in times of civil strife), the step is not formal. But, even in such cases, there is always an affirmative step evidencing the intentional use of sovereign power. See *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) (house arrest by military commander during civil war); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918) (forcible seizure of property by military commander during civil war); and *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918) (same).

Here, no step was taken by the Cuban interventors or any other responsible authority of the Republic of Cuba. Moreover, their failure to act—by way of confiscation or otherwise—was perfectly consistent with their continued refusal to admit receipt of the funds Whatever the evidentiary worth of counsel's statements that his client would not honor Petitioner's claim, they proved nothing more than the fact that Cuba was not affirmatively assuming an obligation it was contesting in court. Assuming, *arguendo*, that counsel's statements could prove anything, they pointed to no affirmative exercise whatsoever of the sovereign power of a foreign country, as has been required by every decision heretofore.

Moreover, it was equally unprecedented to equate counsel's remarks with an Act of State, whatever their content. The Court of Appeals held that the Act of State consisted of the Cuban government's "repudiation" of the obligation to return the funds, "taking the form of a failure to honor the importers' demand (which was confirmed by the Cuban government's counsel at trial)." J. App., 25a. But, as the District Court found, the only basis for the assertion that an Act of State had occurred was counsel's remarks themselves. J. App., 55a.

Once before the Second Circuit held that an in-court statement constituted evidence of a sovereign act; that holding was reversed by this Court. In *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U.S. 68 (1938), a verified statement by the Ambassador of Spain that his country had taken possession of a vessel was filed in court. The Court of Appeals for the Second Circuit held on the basis of that statement that the vessel was immune from judicial process. This Court held such a statement not proof of a sovereign act.

If a foreign plenipotentiary's formal and verified statement is not competent evidence of a sovereign act, surely counsel's litigating position should not constitute conclusive proof of such an act. The Court below dwelt at length on the fact that an Act of State need not be formal, but that fact does not obviate the requirements that there must be some act, that the act be that of a government official within the sovereign's territory, and that there must be competent proof of the act. All these elements are lacking here.

2. The extension of the Act of State doctrine to the facts at bar by the Court of Appeals not only was unprecedented but also was wholly unsupportable by any policy considerations which have heretofore justified the application of the doctrine. The doctrine ordinarily, of course, works an exception to the general jurisprudence of this nation which requires equal treatment to all litigants. This exception is particularly dramatic where, as in the case at bar, an innocent litigant's rights, although firmly established in law, are just as firmly eradicated in fact. Thus, we submit, the doctrine should not be invoked simply by talismanic formula; its utilization is tenable only if justified by overriding public policy.

The purposes underlying the Act of State doctrine have been variously stated to be (1) to avoid embarrassment that might result to this country's foreign relations if our courts denied validity to the acts of officials of another state that would be valid in their land (see Restatement 2d, Foreign Relations Law of the United States, § 41, Comment c; *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, at 763-765 and 774 [1972]) and (2) to not subject to judicial treatment what, in cases such as expropriations, are "political questions" (see *First Nat'l City Bank* v. *Banco Nacional de Cuba, supra*, at 785-789 [dissenting opinion]).

Clearly neither policy was served by application of the doctrine here. Surely no embarrassment to our foreign relations can be feared because of a decision which merely conflicts with counsel's litigating position. Without far more convincing evidence of an act of the Cuban government itself, it is simply absurd to suggest that an affirmative judgment against that government could somehow embarrass the relations (actual or potential) between the two countries.

The policy of not adjudicating "political questions" is likewise not served by allowing counsel to invoke the Act of State doctrine without any underlying analysis of whether facts exist justifying its application. The considerations which impel application of the Act of State doctrine because of judicial reluctance to pass upon "political questions" in cases such as foreign expropriation or military seizure are hardly applicable to a case in which there has been no act by a foreign authority. Moreover, we do not deal here with subject matter—such as expropriation or activities under military occupation—which have controversial political implications in the in-

ternational arena. Here, at most, the possibility was raised that Cuba would refuse to pay a simple debt arising out of a straightforward commercial transaction—a transaction that could not conceivably present any thorny political questions. And indeed both the District Court and the Court of Appeals actually decided the legal issues which fully determine the rights of the parties. Only the award of a judgment in accordance with those rights was deemed precluded by the spectre that Cuba might not honor that judgment, not by proof of any act of Cuba that would make such a judgment embarrassing or that would require the courts to become entangled in difficult political questions.

In effect, therefore, the Court of Appeals granted Cuba sovereign immunity to the extent of refusing to award any affirmative judgment against it. The Court simply assumed that Cuba's possible refusal to recognize liability for this claim precluded our courts from requiring Cuba to do so. Yet had Cuba attempted to raise the defense of sovereign immunity, it would have been met with at least three responses: (1) the doctrine is not available with respect to commercial activity such as the sale of goods; (2) the doctrine is not available with respect to a counterclaim, regardless of amount, arising from the same subject matter as that sued upon; and (3) the doctrine cannot be invoked after the merits of the controversy (here, Cuba's receipt of the moneys paid) have been placed in issue. See, respectively, Restatement 2d, Foreign Relations Law of the United States, §§ 69, 70 (2)(b), and 71(1). These responses all arise from the trend of modern decisions, limiting immunity when the sovereign seeks the aid of our courts or when the sovereign seeks immunity in the context of mercantile, non-governmental activity.

The doctrines of sovereign immunity and Act of State arise from a common source and similar policy considerations. See *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. at 762-763. It is clear, however, that the extension of the Act of State doctrine by the Court of Appeals has obliterated all restraints on the sovereign

immunity defense. Under the Court of Appeals' holding, counsel for a foreign government need only advise our courts that his client will refuse to honor a claim or an adverse ruling. Regardless of the nature of the case, our courts will then be precluded from acting because an "Act of State" will have occurred.

3. The implications of the holding of the Court of Appeals are far-reaching. If that holding is followed, any dispute arising out of a commercial transaction with a foreign government can be immunized from full judicial review in the courts of the United States. A simple statement by counsel for the foreign government will be sufficient to trigger the Act of State doctrine and thus divest our courts of the power to resolve the controversy against the foreign government. We are entering an era marked by a vast increase in commercial dealings between United States nationals and foreign governments—often involving transactions of massive proportions. Under the holding of the Court of Appeals, in disputes arising out of such transactions, our courts will always be available to grant relief against the American national, but, with a word from opposing counsel, never in his favor.

Already the impact of the decision below is being felt, in a case involving far more than the approximately $100,000 at issue here. In *Bank of Boston* v. *Banco Nacional de Cuba*, 61 Civ. 2116 (S.D.N.Y.) (decision pending), plaintiff bank's Cuban branches were nationalized. It brought suit to recover for payments it had made on letters of credit issued by its Cuban branches shortly before nationalization. After trial, and after post-trial briefs were submitted, the trial judge called for supplementary briefs on the impact of the Act of State holding in the instant case, adding that the question raised by that holding "quite understandably [was] not covered in the briefs" of the parties.*

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* Letter to counsel from Hon. Frederick vP. Bryan (U.S.D.J.) dated January 14, 1974, 61 Civ. 2116 (S.D.N.Y.).

Counsel in that case has again interposed an Act of State claim without evidence of any affirmative action in Cuba—this time against plaintiff's contention that the position is directly contrary to a decree of the Cuban government which assumed the obligations sued upon. Plaintiff's Supplemental Post-Trial Brief, pp. 5-6. That contention simply emphasizes the uncertainty which will be created if the Court of Appeals decision is left unreviewed.

The holding below has not merely decided a federal question of great substance in a way totally in conflict with applicable decisions of this court, but has placed in question all the policy grounds upon which the Act of State cases have been decided and upon which modern limits to the doctrine of sovereign immunity have been based. The decision has ominous implications for all future commercial disputes involving foreign governments which come before the courts of the United States. It should not stand unexamined.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue in this case to review the judgment and opinion of the Second Circuit.

February 21, 1974

Respectfully submitted,

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Supreme Court, U. S.
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APPENDIX

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

v.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1974
CERTIORARI GRANTED MAY 13, 1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

v.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Opinion of District Court, filed March 20, 1972 [reproduced in Joint Appendix, filed with Petition for Certiorari, at 41a - 73a]

Supplemental Memorandum to District Court Opinion, filed June 14, 1972 [reproduced in Joint Appendix, at 73a - 75a]

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Opinion of Court of Appeals, filed September 24, 1973 [reproduced in Joint Appendix, at 1a - 38a]

Denials by Court of Appeals of Petitions for Rehearing and Rehearing en banc, filed November 14, 1973 [reproduced in Joint Appendix, at 39a - 40a]

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

This is a petition for certiorari to review the decision of the Court of Appeals for the Second Circuit in four actions against petitioner Dunhill consolidated in the District Court, 61 Civ. 848; 61 Civ. 849; 61 Civ. 850; and 61 Civ. 869. Since the docket entries in these cases are similar, and the four actions were consolidated prior to the filing of amended pleadings, only the relevant docket entries for 61 Civ. 848 are set forth herein.

Date	Proceedings
March 7, 1961	Filed complaint and issued summons.
March 15, 1961	Filed summons and return - served defendants 3/7/61.
[March 27, 1961 to September 29, 1966 -- Various stipulations extending time of defendants to answer.]	
May 16, 1967	Filed notice and order that action is consolidated with 61-849, 61-850, and 61-869 and permitting Republic of Cuba and Daniel Solano Pinera as interventor of Menendez Garcia y Compania, Limitada; F. Palicio y Compania, S.A.; Cifuentes y Compania and Por Larranaga, Fabrica de Tabacos, S.A., permitted to intervene as parties plaintiff in the consolidated action -- the interventor plaintiffs are to file complaint within 45 days as indicated and title is amended accordingly -- Bryan, J M/N.

Date	Proceedings
May 29, 1967	Filed complaint of Interventor-Plaintiffs.
November 8, 1967	Filed Amended Complaint. (Also in 61 Civ. 849, 61 Civ. 850 and 61 Civ. 869.)
November 24, 1967	Filed defendant (Alfred Dunhill of London) Answer to complaint of Interventor-Plaintiffs.
November 30, 1967	Filed Interventor-Plaintiffs Reply to counterclaim of defendant (Alfred Dunhill of London).
December 20, 1967	Filed Interventor-Plaintiffs Interrogatories.
December 27, 1967	Filed defendant Alfred Dunhill of London Interrogatories.
January 8, 1968	Filed Defendant Answers to Interrogatories (Alfred Dunhill of London, Inc.).
January 23, 1968	Filed Answers of Interventor-Plaintiffs to interrogatories, propounded by defendant Alfred Dunhill of London, Inc.
January 14, 1968	Filed Defendant (Alfred Dunhill of London) Amended Answer to the complaint of the Interventor-Plaintiffs.
January 8, 1969	Before Bryan, J. - non-jury trial begun.
January 9, 1969	Trial continued.
January 10, 1969	Trial continued.
January 13, 1969	Trial continued.
January 14, 1969	Trial continued.
January 15, 1969	Trial continued and concluded. Decision reserved.
March 20, 1972	Filed Opinion #38347 by Bryan, J. "This opinion constitutes findings of fact and conclusions of law in the consolidated actions. Settle Judgment on 30 days' notice." (mailed notices) (Filed in 61 Civ. 472).

Date	Proceedings
April 19, 1972	Filed Defendant Alfred Dunhill of London, Inc. notice of motion returnable at time and place designated by court, for an order clarifying opinion filed 3-20-72.
June 14, 1972	Filed Supplemental Memorandum by Bryan, J.
August 14, 1972	Filed Final Judgment #72,776. Bryan, J. Judgment entered 8-23-72 Clerk. Entered 8-24-72 - mailed notice.
September 8, 1972	Filed Notice of Appeal by the Republic of Cuba and Daniel Solano Pinera, as Interventor of Menendez, Garcia y Compania, Limitada, etc. (mailed copies).
September 21, 1972	Filed defendants Alfred Dunhill of London, Inc. Notice of Appeal to the U.S. Court of Appeals for the Second Circuit from the Order of the Final Judgment of Aug. 23-72. Mailed Notice to Rabinowitz, Boudin & Standard & Jac M. Wolff.
June 19, 1973	Argument heard (by: Friendly, Feinberg and Mansfield, CJJ)
September 24, 1973	Judgment Affirmed in part; reversed in part, Mansfield (& in 72-2379, 72-2385, 72-2390-92, 72-2400-02)
October 9, 1973	Filed petition for rehearing and rehearing in banc (& in 72-2379, 72-2385, 72-2390-92, 72-2400-02) with proof of service
November 14, 1973	Filed order denying petition for rehearing (& in 72-2379, 72-2385, 73-2390-92, 72-2400-02)
November 14, 1973	Filed order denying petition for rehearing in banc (& in 72-2379, 72-2385, 72-2390-92, 72-2400-02)
February 11, 1974	Filed copy of notice by Supreme Court granting extension of time to petition for writ of certiorari to 2-21-74
February 28, 1974	Filed notice of filing of petition for writ of certiorari (Alfred Dunhill) (S.C.#73-1288) (& in 72-2379,85, 90-1-2, 2400-01-02)

Date	Proceedings
February 28, 1974	Filed notice of filing of petition for writ of certiorari (Saks and Co.) (S.C.#73-1289) (& in 72-2379, etc.)
February 28, 1974	Filed notice of filing of petition for writ of certiorari (Republic of Cuba) (S.C.#73-1287) (& in 72-2379, etc.)
May 20, 1974	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (S.C.#73-1288) (Alfred Dunhill) Council in this case are directed to brief and argue certain questions.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

RAFAEL CIFUENTES, RAMON CIFUENTES and MANUEL CIFUENTES, co-partners, doing business under the firm name and style of CIFUENTES Y COMPANIA; ALONSO MENENDEZ, JOSE M. GARCIA, BENJAMIN MENENDEZ and ADOLFO GARCIA, co-partners, doing business under the firm name and style of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; POR LARRANAGA, FABRICA DE TABACOS, S.A.; and F. PALICIO Y COMPANIA, S.A.,

Owner-Plaintiffs,

- against -

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; F. PALICIO Y COMPANIA, S.A.; CIFUENTES Y COMPANIA and POR LARRANAGA, FABRICA DE TABACOS, S.A.,

Interventor-Plaintiffs,

- against -

DUNHILL INTERNATIONAL, INC. and ALFRED DUNHILL OF LONDON, INC.,

Defendants.

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Interventor-plaintiffs, for their complaint, by their attorneys, Rabinowitz & Boudin, respectfully allege:

1. This Court has jurisdiction of this action under Title 28, U.S.C. § 1332. Interventor-plaintiff Republic of Cuba is a foreign state; interventor-plaintiff Daniel Solano Pinera is a citizen of the Republic of Cuba; Menendez, Garcia y Compania, Limitada, F. Palicio y Compania, S.A., Cifuentes y Compania and Por Larranaga, Fabrica de Tabacos, S.A. are business entities organized under the laws of the Republic of Cuba. Defendants Dunhill International, Inc. and Alfred Dunhill of London, Inc. are corporations organized under the laws of the State of Delaward, with offices at 11 East 26th

Street, New York, N.Y.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

3. Defendants are engaged in the importation and sale of cigars and other tobacco products.

4. Interventor-plaintiff Daniel Solano Pinera is the interventor, duly appointed under the laws of Cuba, of Menendez, Garcia y Compania, Limitada, F. Palicio y Compania, S.A., Cifuentes y Compania and Por Larranaga, Fabrica de Tabacos, S.A., all of which are business entities engaged in the manufacture of cigar and other tobacco products in Cuba and in the sale of such products throughout the world.

5. At various times between September 15, 1960 and February 28, 1961, the interventor-plaintiffs sold to the defendant Alfred Dunhill of London, Inc. cigars on an open account on which there is now owing the sum of $91,416.25.

WHEREFORE, interventor-plaintiffs demand judgment against the defendant Alfred Dunhill of London, Inc. in the sum of $91,416.25 with interest from February 26, 1961, together with the costs and disbursements of this action.

RABINOWITZ & BOUDIN

By Victor Rabinowitz
Victor Rabinowitz
Member of the Firm
30 East 42nd Street
New York, N.Y. 10017

Dated, May 26, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAFAEL CIFUENTES, RAMON CIFUENTES and MANUEL CIFUENTES, co-partners, doing business under the firm name and style of CIFUENTES Y COMPANIA; ALONSO MENENDEZ, JOSE M. GARCIA, BENJAMIN MENENDEZ, JOSE MENENDEZ and ADOLFO GARCIA, co-partners, doing business under the firm name and style of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; POR LARRANAGA, FABRICA DE TABACOS, S.A.; and F. PALICIO Y COMPANIA, S.A.,	:	61 Civ. 848 849 850 869
Owner-Plaintiffs,	:	ANSWER
-against-	:	
THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor of MENENDEZ GARCIA PINERA, as Interventor of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; F. PALICIO Y COMPANIA, S.A.; CIFUENTES Y COMPANIA and POR LARRANAGA, FABRICA DE TABACOS, S.A.,	:	
Interventor-Plaintiffs,	:	
-against-	:	
DUNHILL INTERNATIONAL, INC. and ALFRED DUNHILL OF LONDON, INC.,	:	
Defendants.	:	

Defendant, Alfred Dunhill of London, Inc., by its attorneys, Strasser, Spiegelberg, Fried & Frank, answering the complaint of the Interventor-Plaintiffs as against said defendant, respectfully alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1" of the complaint, except admits that the Republic of Cuba is a foreign state and that defendant

Alfred Dunhill of London, Inc. (hereinafter referred to as "Dunhill") is a corporation organized under the laws of the State of Delaware with offices at 11 East 26th Street, New York, New York, and denies that defendant Dunhill International, Inc. maintains offices at 11 East 26th Street, New York, New York.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "4" of the complaint.

3. Denies each and every allegation contained in paragraph "5" of the complaint, except admits that subsequent to September 15, 1960, the interventor-plaintiffs shipped cigars to defendant Dunhill on an open account.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, SET-OFF AND COUNTERCLAIM

4. On cigars shipped by said interventor-plaintiffs to defendant Dunhill subsequent to September 15, 1960, there exist outstanding and unpaid claims of defendant Dunhill for damaged cigars in the amount of $1,484.88, for a lost shipment of cigars in the amount of $200.65, and for advertising allowances in the amount of $7,910.19.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, SET-OFF AND COUNTERCLAIM

5. That at various times subsequent to September 15, 1960, the interventor-plaintiffs

sold to defendant Dunhill the cigars which are the subject of this action, and said interventor-plaintiffs represented that they were the owners thereof, had full title thereto, and impliedly warranted that said cigars were delivered free of the rightful claim of any third person by way of trademark infringement.

6. That in purchasing said cigars defendant Dunhill relied on said implied warranty.

7. That on or about November 9, 1967, the owner-plaintiffs in this action served defendant Dunhill with an amended complaint alleging that defendant Dunhill has infringed trademarks owned by said owner-plaintiffs, which trademarks were affixed to the cigars sold by the interventor-plaintiffs to defendant Dunhill, and thereby has committed acts of unfair competition against the said owner-plaintiffs, that said amended complaint demands judgment from defendant Dunhill for treble damages and seeks an accounting of the gains, profits and advantages of defendant Dunhill by reason of the alleged infringement of trademarks and acts of unfair competition.

8. That said interventor-plaintiffs have had actual notice of the claims of the owner-plaintiffs by reason of their standing in this action and by service of the amended complaint upon said interventor-plaintiffs; and that said interventor-plaintiffs have refused to defend said action on behalf of defendant Dunhill.

9. That by reason of the foregoing, the interventor-plaintiffs are or may be liable to defendant Dunhill

wholly or in part for any judgment obtained against defendant Dunhill by said owner-plaintiffs on account of the aforesaid claims, together with the costs to Dunhill, including reasonable attorneys' fees, incurred in the defense of said claims.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

10. Payment by defendant Dunhill of any sums which may be due to interventor-plaintiffs for cigars shipped subsequent to September 15, 1960 has been prohibited by law at least since July 8, 1963 by virtue of the provisions of the Cuban Assets Control Regulations, 31 C.F.R. 515.101 et seq.

WHEREFORE, defendant Dunhill demands judgment against the interventor-plaintiffs as follows:

(a) dismissing the complaint served on behalf of the interventor-plaintiffs;

(b) in the amount of $9,595.72 on account of the First Set-Off and Counter-claim contained herein; and

(c) in the amount of any judgment obtained against defendant Dunhill by the owner-plaintiffs on account of the claims of trademark infringement and unfair competition asserted by said owner-plaintiffs against defendant, together

with the costs to defendant Dunhill, including reasonable attorneys' fees, incurred in the defense of said claims, together with the costs and disbursements of this action.

STRASSER, SPIEGELBERG, FRIED & FRANK

By: _____
A Member of the Firm
Attorneys for Defendant
ALFRED DUNHILL OF LONDON, INC.
Office & P.O. Address
120 Broadway
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAFAEL CIFUENTES, RAMON CIFUENTES and MANUEL CIFUENTES, co-partners, doing business under the firm name and style of CIFUENTES Y COMPANIA; ALONSO MENENDEZ, JOSE MENENDEZ and ADOLFO GARCIA, co-partners, doing business under the firm name and style of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; POR LARRANAGA, FABRICA DE TABACOS, S.A.; and F. PALICIO Y COMPANIA, S.A.,	:	61 Civ. 848 849 850 869
Owner-Plaintiffs,	:	
- against -	:	
THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor of MENENDEZ GARCIA PINERA, as Interventor of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; F. PALICIO Y COMPANIA, S.A.; CIFUENTES Y COMPANIA and POR LARRANAGA, FABRICA DE TABACOS, S.A.,	:	REPLY
Interventor-Plaintiffs,	:	
- against -	:	
DUNHILL INTERNATIONAL, INC. and ALFRED DUNHILL OF LONDON, INC.,	:	
Defendants.	:	

The interventor-plaintiffs, by Rabinowitz & Boudin, their attorneys, for their reply to the answer of the defendant, Alfred Dunhill of London, Inc., allege:

AS AND FOR A REPLY TO
THE FIRST COUNTERCLAIM

1. Deny each and every allegation contained in paragraph 4 of the answer.

AS AND FOR A REPLY TO
THE SECOND COUNTERCLAIM

2. Deny each and every allegation contained in paragraphs 5, 6, 8 and 9 of the answer.

3. Deny each and every allegation contained in paragraph 7 of the answer, except admit that the owner-plaintiffs in this action have served defendant, Alfred Dunhill of London, Inc., with an amended complaint; interventor-plaintiffs respectfully refer the Court to that complaint for a full statement of the contents thereof.

WHEREFORE, the interventor-plaintiffs demand judgment against the defendant, Alfred Dunhill of London, Inc., dismissing the first and second counterclaims set forth in its answer.

RABINOWITZ & BOUDIN

By: /s/ Victor Rabinowitz
Attorneys for the Interventor-Plaintiffs
Office & P.O. Address
30 East 42nd Street
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAFAEL CIFUENTES, et al.,	:	
Owner-Plaintiffs,	:	61 Civ. 848 849 850 869
-against-	:	
THE REPUBLIC OF CUBA, et al.,	:	
Interventor-Plaintiffs,	:	
-against-	:	AMENDED ANSWER
DUNHILL INTERNATIONAL, INC. and ALFRED DUNHILL OF LONDON, INC.,	:	
Defendants.	:	

Defendant, Alfred Dunhill of London, Inc., by its attorneys, Strasser, Spiegelberg, Fried & Frank, as and for its amended answer to the complaint of the Interventor-Plaintiffs as against said defendant, respectfully alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1" of the complaint, except admits that the Republic of Cuba is a foreign state and that defendant Alfred Dunhill of London, Inc. (hereinafter referred to as "Dunhill") is a corporation organized under the laws of the State of Delaware with offices at 11 East 26th Street, New York, New York, and denies that defendant Dunhill International, Inc. maintains offices at 11 East 26th Street, New York, New York.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "4" of the complaint.

3. Denies each and every allegation contained in paragraph "5" of the complaint, except admits that subsequent to September 15, 1960, the interventor-plaintiffs shipped cigars to defendant Dunhill on an open account.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, SET-OFF AND COUNTERCLAIM

4. On cigars shipped by said interventor-plaintiffs to defendant Dunhill subsequent to September 15, 1960, there exist outstanding and unpaid claims of defendant Dunhill for damaged cigars in the amount of $1,484.88, for a lost shipment of cigars in the amount of $200.65, and for advertising allowances in the amount of $7,910.19.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, SET-OFF AND COUNTERCLAIM

5. That at various times subsequent to September 15, 1960, the interventor-plaintiffs sold to defendant Dunhill the cigars which are the subject of this action, and said interventor-plaintiffs represented that they were the owners thereof, had full title thereto, and impliedly warranted that said cigars were delivered free of the rightful claim of any third person by way of trademark infringement.

6. That in purchasing said cigars defendant Dunhill relied on said implied warranty.

7. That on or about November 9, 1967, the owner-plaintiffs in this action served defendant Dunhill with an amended complaint alleging that defendant Dunhill has infringed trademarks owned by said owner-plaintiffs, which trademarks were affixed to the cigars sold by the interventor-plaintiffs to defendant Dunhill, and thereby has committed acts of unfair competition against the said owner-plaintiffs, that said amended complaint demands judgment from defendant Dunhill for treble damages and seeks an accounting of the gains, profits and advantages of defendant Dunhill by reason of the alleged infringement of trademarks and acts of unfair competition.

8. That said interventor-plaintiffs have had actual notice of the claims of the owner-plaintiffs by reason of their standing in this action and by service of the amended complaint upon said interventor-plaintiffs; and that said interventor-plaintiffs have refused to defend said action on behalf of defendant Dunhill.

9. That by reason of the foregoing, the interventor-plaintiffs are or may be liable to defendant Dunhill wholly or in part for any judgment obtained against defendant Dunhill by said owner-plaintiffs on account of the aforesaid claims, together with the costs to Dunhill, including reasonable attorneys' fees, incurred in the defense of said claims.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, SET-OFF AND COUNTERCLAIM

10. Prior to September 15, 1960 the owner-plaintiffs shipped to defendant, and defendant received, shipments of cigars, the invoice prices of which are set forth in Exhibit A to the Stipulation of Facts to which defendant respectfully refers.

11. Subsequent to September 15, 1960, defendant made payment for the aforesaid shipments by checks. The dates of said checks and the persons to whom said checks were made payable are set forth in the aforesaid Exhibit A.

12. On information and belief, interventor-plaintiffs received and retained the proceeds of said checks despite the fact that they knew or should have known that they were not entitled thereto.

13. Defendant has duly demanded of the interventor-plaintiffs return of said proceeds, but no part thereof has been repaid by the interventor-plaintiffs.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

14. Payment by defendant Dunhill of any sums which may be due to interventor-plaintiffs for cigard shipped subsequent to September 15, 1960 has been prohibited by law at least since July 8, 1963 by virtue of the provisions of the Cuban Assets Control Regulations, 31 C.F.R. 515.101 et seq.

WHEREFORE, defendant Dunhill demands judgment

against the interventor-plaintiffs as follows:

(a) dismissing the complaint served on behalf of the interventor-plaintiffs;

(b) in the amount of $9,595.72 on account of the First Set-Off and Counter-claim contained herein;

(c) in the amount of any judgment obtained against defendant Dunhill by the owner-plaintiffs on account of the claims of trademark infringement and unfair competition asserted by said owner-plaintiffs against defendant, together with the costs to defendant Dunhill, including reasonable attorneys' fees, incurred in the defense of said claims; and

(d) in the amount of all sums received by the interventor-plaintiffs for shipments of cigars to the defendant Dunhill made by the owner-plaintiffs prior to September 15, 1960,

together with the costs and disbursements of this action.

STRASSER, SPIEGELBERG, FRIED & FRANK

By: _____
A Member of the Firm
Attorneys for Defendant
ALFRED DUNHILL OF LONDON, INC.
Office and P.O. Address
120 Broadway
New York, New York 10005

your h[illegible], Yourhonor.

(Ended up)

THE COURT: All right.

MR. BLUMENTHAL: The defendant Faber, Coe & Gregg rests, your Honor.

MR. FRIEDMAN: Just two things for defendant Dunhill. We have been handed this morning amended answers to conform to the proof, both to the complaint of the interventor-plaintiffs and the owner-plaintiffs, and I would ask leave to serve and file those amended answers.

THE COURT: Do they change any issues in the case?

MR. FRIEDMAN: No, your Honor, not at all.

MR. RABINOWITZ: They do. I haven't had an opportunity to read it closely but --

MR. FRIEDMAN: Let me describe the amended answers.

THE COURT: Describe the amendments.

MR. FRIEDMAN: The only amendment to the complaint of the owner-plaintiffs is specifically setting forth an affirmative defense to payment with regard to the pre-intervention shipments. And the only change in the amended

[illegible]

answers to the complaint of the interventor-plaintiffs is to allege a setoff and counterclaim similar to the one that was proposed by Mr. Grosz on behalf of Saks, that is, for either money having been received, or whatever the theory is, the moneys received by the interventor-plaintiffs for goods sold or shipments made prior to September 15, 1960.

THE COURT: Well, let me just follow that a minute. I would presume that what you are saying is, in substance, that if I should hold that-- no, I don't quite follow you. Suppose you spell that out a little more carefully, Mr. Friedman.

MR. FRIEDMAN: It would really be in the nature of an alternative argument, your Honor. If the payments that were made by defendant Dunhill after intervention for the goods sold or the goods shipped prior to intervention constitute payment and a discharge on behalf of Dunhill, then the amended answer to the interventor complaint is really irrelevant. But in the alternative, if your Honor should hold that that did not constitute sufficient payment in behalf of Dunhill's obligation --

THE COURT: They're still liable to the owner-plaintiffs.

MR. FRIEDMAN: Then we should be entitled to recover and setoff against any such obligation the amounts that the interventor-plaintiffs received for pre-intervention shipments.

THE COURT: That is right.

MR. FRIEDMAN: I don't think there is any surprise in this. I think your Honor is well aware this has been an issue for well over a year now.

MR. RABINOWITZ: Subject to any defense we might have on the statute of limitations--

THE COURT: Obviously, if there are any defenses to the defenses you are entitled to serve a reply or whatever you want to call it. Presumably it is a reply; a pleading that would state your position. For instance, if you concede there will be a statute of limitation defense -- I am not saying that you do -- you certainly ought to have a pleading so you can draw the issue, and you are entitled to serve that within, say, five days if you wish.

MR. RABINOWITZ: Fine, and we may have the same amount of time then to serve a similar pleading in response to Saks who, I think, served a similar

answer on us two or three days ago.

THE COURT: All right.

MR. WOLFF: There was also served a proposed amended answer as to the complaint of the owner-plaintiffs. I see no claim against us for affirmative judgment, and I assume --

THE COURT: I don't think there could be. I see nothing in this case, Mr. Wolff, that gives rise to the claim for affirmative judgment against your client.

MR. WOLFF: What I would like to conclude with is this, that let it be presumed and deemed for the purposes of this record that the owner-plaintiffs have denied the allegations of the affirmative defenses in the nature of a reply.

THE COURT: All right, it is so assumed, on the record.

MR. WOLFF: And the same with the Saks new answer.

THE COURT: Same with the Saks amended complaint.

MR. FRIEDMAN: May I file it?

THE COURT: Yes, you may file it.

MR. FRIEDMAN: I have just one other thing,

SOUTHERN DISTRICT COURT REPORTERS
United States Court House
Foley Square N.Y., N.Y. 10007 Telephone (212) 7-4580

Filed Aug 14 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAFAEL CIFUENTES, RAMON CIFUENTES and MANUEL CIFUENTES, co-partners, doing business under the firm name and style of CIFUENTES Y COMPANIA; ALONSO MENENDEZ, JOSE M. GARCIA, BENJAMIN MENENDEZ, JOSE MENENDEZ and ADOLFO GARCIA, co-partners, doing business under the firm name and style of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; POR LARRANAGA, FABRICA DE TABACOS, S.A.; and F. PALICIO Y COMPANIA, S.A.,

Owner-Plaintiffs,

-against-

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; F. PALICIO Y COMPANIA, S.A.; CIFUENTES Y COMPANIA and POR LARRANAGA, FABRICA DE TABACOS, S.A.,

Interventor-Plaintiffs,

-against-

ALFRED DUNHILL OF LONDON, INC.,

Defendant.

61 Civil 848
(Includes:
61 Civil 849;
61 Civil 850;
61 Civil 869)

FINAL JUDGMENT

This cause having been considered by this Court upon the pleadings and evidence presented on trial and upon the briefs by the counsel for the parties and upon the findings of fact and conclusions of law set forth in the opinions dated and filed in this Court on March 17, 1972 and June 14, 1972, it is

ORDERED, ADJUDGED AND DECREED:

1. Owner-plaintiff, Menendez, Garcia Y Compania, Limitada recover of the defendant, Alfred Dunhill of London, Inc., the sum of $133,386.70 with interest thereon from March 7, 1961 at the rate of 6% to June 30, 1968, at the rate of 7-1/4% from July 1, 1968 to February 15, 1969, and at the rate of 7-1/2% from February 16, 1969 to July 19, 1972 in the sum of $98,893.74, amounting in all to $232,280.44.

2. The claim of the owner-plaintiff, Cifuentes Y Compania against the defendant, Alfred Dunhill of London, Inc. for goods sold and delivered is dismissed.

3. Owner-plaintiff, F. Palicio Y Compania, S.A., recover of the defendant, Alfred Dunhill of London, Inc., the sum of $1,928.65 with interest thereon from March 8, 1961 at the rate of 6% to June 30, 1968, at the rate of 7-1/4% from July 1, 1968 to February 15, 1969, and at the rate of 7-1/2% from February 16, 1969 to July 19, 1972, in the sum of $1,429.81, amounting in all to $3,355.46.

4. Owner-plaintiff, Por Larranaga Fabrica De Tabacos, S.A., recover of the defendant, Alfred Dunhill of London, Inc., the sum of $5,977.55 with interest thereon from March 7, 1961 at the rate of 6% to June 30, 1968, at the rate of 7-1/4% from July 1, 1968 to February 15, 1969, and at the rate of 7-1/2% from February 16, 1969 to July 19, 1972, in the sum of $4,431.95, amounting in all to $10,409.50.

5. Interventor-plaintiffs recover of the defendant, Alfred Dunhill of London, Inc., the sum of $92,949.70 with interest thereon from June 28, 1961 at the rate of 6% to June 30, 1968, at the rate of 7-1/4% from July 1, 1968 to February 15, 1969, and at the rate of 7-1/2% from February 16, 1969 to July 19, 1972, in the sum of $67,202.96, amounting in all to $160,152.66.

6. Defendant, Alfred Dunhill of London, Inc., recover of the owner-plaintiff, Menendez, Garcia Y Compania, Limitada, by way of offset for damaged cigars, a lost shipment and an advertising allowance the sum of $2,425.04 with interest thereon from March 7, 1961 at the rate of 6% to June 30, 1968, at the rate of 7-1/4% from July 1, 1968 to February 15, 1969, and at the rate of 7-1/2% from February 16, 1969 to July 19, 1972, in the sum of $1,791.36, amounting in all to $4,216.40.

7. Defendant, Alfred Dunhill of London, Inc., recover of the owner-plaintiff, F. Palicio Y Compania, S. A., by way of offset for damaged cigars, a lost shipment and an advertising allowance the sum of $744.94 with interest thereon from March 8, 1961 at the rate of 6% to June 30, 1968, at the rate of 7-1/4% from July 1, 1968 to February 15, 1969, and at the rate of 7-1/2% from February 16, 1969 to July 19, 1972, in the sum of $550.14, amounting in all to $1,295.08.

8. Defendant, Alfred Dunhill of London, Inc., recover of the owner-plaintiff, Por Larranaga Fabrica De Tabacos, S.A., by way of offset for damaged cigars, a lost shipment and an advertising allowance the sum of $666.07 with interest thereon from March 7, 1961 at the rate of 6% to June 30, 1968, at the rate of 7-1/4% from July 1, 1968 to February 15, 1969, and at the rate of 7-1/2% from February 16, 1969 to July 19, 1972, in the sum of $491.75, amounting in all to $1,157.82.

9. Defendant, Alfred Dunhill of London, Inc., recover of the interventor-plaintiffs, the sum of $141,292.90 and the sum of $5,759.70, said recoveries totalling $147,052.60 with interest thereon from June 28, 1961 at the rate of 6% to June 30, 1968, at the rate of 7-1/4% from July 1, 1968 to February 15, 1969, and at the rate of 7-1/2% from February 16, 1969 to July 19, 1972, in the sum of $106,320.17, amounting in all to $253,372.77.

10. Owner-plaintiff, Menendez, Garcia y Compania, Limitada was, as of February, 1961, the owner of trademark H. UPMANN and the United States trademark registration therefor No. 89,518 and the trademark MONTE CRISTO and the United States trademark registration therefor No. 332,324 and said trademarks and registrations were then valid and subsisting.

11. Owner-plaintiff, Cifuentes y Compania, was, as of February, 1961, the owner of its trademark PARTAGAS and the United States trademark registration therefor Nos. 356,751, 440,817, 544,329 and 545,830 and its trademark RAMON ALLONES and the United States trademark registrations therefor Nos. 240,574 and 529,452 and said marks and registrations were then valid and subsisting.

12. Owner-plaintiff, Por Larranaga Fabrica De Tabacos, S.A., was, as of February, 1961, the owner of its trademark POR LARRANAGA and the United States trademark registrations therefor Nos. 277,130 and 277,131 and said marks and registrations were then valid and subsisting.

13. Owner-plaintiff, F. Palicio y Compania, S.A., was, as of February, 1961, the owner of its trademark HOYO DE MONTERREY and the United States trademark registration therefor No. 86,340 and its trademark BELINDA and the United States trademark registrations therefor Nos. 111,205, 226,818 and 307,755 and its trademark PUNCH and the United States trademark registration therefor No. 261,894, which marks and registrations were then valid and subsisting.

14. The interventor-plaintiffs and the defendant, Alfred Dunhill of London, Inc., did unfairly compete with all of the owner-plaintiffs and infringed the said trademark rights of all of the owner-plaintiffs prior to February, 1961.

15. The owner-plaintiffs suffered no damage as a result of such unfair competition and infringement and hence are denied recovery of damages and profits with respect thereto.

16. The owner-plaintiffs are denied an injunction against future unfair competition and trademark infringement by the defendant and the interventor-plaintiffs at this time, but without prejudice to an application for such relief under appropriate circumstances in the future.

17. The owner-plaintiffs ~~and the interventor-plaintiffs~~ are hereby awarded costs against the defendant, ~~which costs shall be~~ borne by the defendant on a pro rata basis in ~~accordance with the total amounts required by this judgment to be actually paid by the defendant~~, respectively to the ~~owners and the interventors~~; and the defendant is awarded costs against the interventor-plaintiffs.

Frederick V. Bryan
U. S. D. J.

Dated: August 12 1972

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 13, 1974

Leon Silverman, Esq.
Fried, Frank, Harris, Shriver
& Jacobson
120 Broadway
New York, N. Y. 10005

RE: ALFRED DUNHILL OF LONDON, INC. v.
REPUBLIC OF CUBA, No. 73-1288

Dear Mr. Silverman:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted. Counsel in this case are directed to brief and argue the following questions:

'1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an act of state?

'2. If so, is an exception to the act of state doctrine created, under First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's co-defendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?'"

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By Helen K. Loughran
(Mrs.) Helen K. Loughran
Assistant Clerk

Encls.

Supreme Court, U. S.
FILED
MAR 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

—against—

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, As Interventor,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RABINOWITZ, BOUDIN & STANDARD
Attorneys for Respondents
30 East 42nd Street
New York, New York 10017

March 20, 1974

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

—against—

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, As Interventor,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents, Republic of Cuba and Daniel Solano Pinera, as Interventor, oppose the granting of a petition for certiorari in this matter for the following reasons:

1. The petition for certiorari seeks consideration of a question passed upon by this Court in *Banco Nacional* v. *Sabbatino*, 376 U.S. 398, 415, fn. 17 (1964). It is clear from that decision that the Court will not inquire into the degree of formality with which an act of state is expressed. Applying the test held proper in the second paragraph of that footnote, we would have to inquire whether the Cuban courts would recognize the legitimacy of the debt in question here. The answer is as clearly in the negative in this case

as it was in the *Sabbatino* case. And, see *French* v. *Banco Nacional*, 23 N.Y.2d 46 at 65 (1968).

2. Furthermore, the petition is based on a serious distortion of the record and on a consequent misstatement of respondents' position.

First, petitioner (Pet. p. 3) materially misstates the nature of the holding by the district court in *Palicio* v. *Brush & Bloch*, 256 F.Supp. 481 (S.D.N.Y. 1966), aff'd, 375 F.2d 1011 (2nd Cir. 1967), cert. den., 389 U.S. 830 (1967). In that case the district court decided that the respondents could recover for post-intervention shipments but it did not pass upon "the question of who was entitled to pursue claims for the price of cigars shipped . . . before the intervention . . ." (J.A. 43a). The Court of Appeals agreed (J.A. 10a). That issue, the right to payment for pre-intervention shipments, was before the court in this case and it was extensively litigated.

From its faulty premise, petitioner goes on to assert that respondents had, in this case, denied receipt of the payments for pre-intervention shipments. Indeed, at p. 3 of the petition, such denial is characterized as "interventors' principal line of defense." The Cuban government's alleged "failure to act" was, says petitioner, consistent with this defense (Pet. p. 5).

But respondents never denied receipt of the payments, and the record seems clear that a large portion of the payments were, in fact, received. Respondents merely stated to the court the fact that their records of the 1960 transactions were incomplete and that they could not either affirm or deny receipt of the funds (J.A. 22a, 46a.).[1] The fact

1. We must recall that the events which gave rise to this lawsuit took place in the midst of a revolution in Cuba, and the loss or destruction of the records of commercial transactions is not particularly surprising.

that the records were lost was not respondents' "principal line of defense." It was merely an argument which sought to shift the burden of proof of payment to the importers. The district court held that the importers had sufficiently proven that they had paid the funds in question to the interventor and that the interventor had received those monies; the respondents disagreed with that conclusion, but, on appeal, the Court of Appeals affirmed the decision of the lower court and there is no further issue as to this matter.

The respondents did, however, have serious substantive grounds for contesting their liability. They argued that even if they had received the payments, the payments were not recoverable in this suit because (1) the nationalization of the owners' property included the nationalization of the owners' accounts receivable, and hence the interventor was entitled to the payments in question (J.A. 47a, 48a); and (2) in any event, the Act of State doctrine was a complete defense.

3. We must initially note that this is not a case like *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918) or *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918), in which the foreign state whose act was alleged as a defense was not a party to the action. In such cases, obviously, some degree of formality might reasonably be required to enable a third party to plead act of state.[2] *French* v. *Banco Nacional*, supra at 66, fn. 1. But here, the Republic of Cuba is a party to the suit. For seven long years it has been asserting that its repudiation of the debt was its act of state. That assertion was made in the district court, in the court of appeals and is now being made in this Court. It has been and is being made by counsel, which is the way a party litigant makes known its legal position in our

2. It will be noted that even in many of these cases, the act of state found to be binding was, to put it mildly, informal.

judicial system. The reason for the assertion of the defense of act of state—whether it be because of Cuba's view of the law, or considerations of its own public policy—is not relevant. The courts have never inquired into the reasons for the assertion of an act of state defense.

4. Petitioner places heavy reliance on *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U.S. 68 (1938), which is cited for the proposition that the statement of an ambassador is not "evidence of a sovereign act" and hence the statement of counsel is not (Pet. p. 6). Petitioner misreads the case. The issue there was whether, in fact, the government of Spain had ever taken possession of The Navemar while it was at Rosario or Buenos Aires, Argentina. The Spanish government, speaking through its Ambassador, contended that it had taken possession of the ship in one of those ports; the record showed no such act by the Spanish government. The issue in that case was not whether the Court would accept the statement of the Ambassador as a statement of the government, but rather whether the statement of the government, as asserted through the Ambassador, was in fact supported by the record. The Court found that it was not.[3]

Finally, it will be noted that the issue in *The Navemar* was whether sovereign immunity applied and not act of state. There could have been no act of state defense made because, as we have noted, the act in question was alleged to have taken place outside the territory of Spain.

5. Petitioner argues (Pet. p. 9) that the decision of the court below obliterates the difference between the act of state doctrine and sovereign immunity, thus destroying the restrictive nature of the latter doctrine.

3. The Court will recall that the facts giving rise to *The Navemar* litigation arose in the midst of the Spanish Civil War, at a time when there was much doubt as to who was the Spanish government.

There is no doubt that the doctrines of sovereign immunity and act of state are related and that at times they overlap. There are many cases in which sovereign immunity is a defense and act of state would not be. For example, *Spacil* v. *Crowe*, 489 F.2d 614 (5th Cir., 1974). There are other cases in which the converse is true. *French* v. *Banco Nacional, supra; Oetjen* v. *Central Leather Co., supra; Ricaud* v. *American Metal Co., supra.* And there may be still other situations in which either defense would be available.

But the difference between the doctrines still exists and the decision of the court below does not erase that difference. For example, sovereign immunity is available only to the sovereign and may be restricted in its nature;[4] the act of state defense is available only as to acts done within the territory of the state.

Petitioners' analysis makes little sense since it seems to admit that if some Cuban government agency had enacted a decree saying "we hereby repudiate this debt," all of the dire consequences considered at page 9 of its petition would have followed anyhow. The requirement of such a pro forma decree is precisely the "formality" which this Court rejected as unnecessary in *Sabbatino, supra*, p. 1.

6. Petitioner makes reference to *Bank of Boston* v. *Banco Nacional*, 61 Civ. 2116 (S.D.N.Y.) (decision pending), and it is true that the decision of the Court of Appeals here may have a decisive effect on that case. But it is *not* true, as petitioner suggests (Pet. p. 9), that the defendant

4. Compare the "Tate Letter," 26 U.S. State Dept. Bulletin 984 (1952) and *Victory Transport* v. *Comisaria General*, 336 F.2d 354 (1964), with *Rich* v. *Naviera Vacuba*, 295 F.2d 24 (4th Cir. 1961) and *Spacil* v. *Crowe, supra.* Actually this Court has never passed on the State Department position as expressed in the Tate Letter, although, as the cases cited indicate, the State Department itself ignores the Tate Letter when it seems politically advisable.

in that case belatedly raised the act of state defense. Actually, the defense was pleaded in its answer and was argued to the court both in pre-trial and post-trial briefs, and in oral argument.[5]

7. A final note. If an act of state doctrine was not available to respondents, the result would be same. As the Court of Appeals pointed out (J.A. 24a), the obligation on which petitioner sues was quasi-contractual in nature; it arose in Cuba, and its situs was in Cuba. Accordingly it would be governed by Cuban law in any event. There can be little doubt that in the circumstances of this case Cuban courts would hold for the respondents.

Respectfully submitted,

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Dated: March 20, 1974.

5. Petitioner, at page 9, misquotes a letter from Judge Bryan. Judge Bryan did not say that the act of state issue was not covered in the briefs of the parties; what he said was that the impact of the decision of the Court of Appeals in this case was not covered in the briefs of the parties, which was "quite understandabl[e]" because the decision here came down a year after the briefs in the *Bank of Boston* case were submitted.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

v.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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August 8, 1974

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 345 F. Supp. 527 and is reproduced in the Joint Appendix filed with the Petition for a Writ of Certiorari (J. App.) at pages 41a-75a. The opinion of the United States Court of Appeals for the Second Circuit, reversing in part the decision of the District Court, is reported at 485 F.2d 1355 and is reproduced in the Joint Appendix at pages 1a-38a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 24, 1973.

A timely petition for rehearing, with suggestion for rehearing en banc, was denied on November 14, 1973, and an extension of time to file a petition for a writ of certiorari to and including February 21, 1974 was granted by Mr. Justice MARSHALL on February 7, 1974. The petition was filed on February 21, 1974 and was granted on May 13, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

As framed by the Court in granting the petition, the questions presented are:

1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an "act of state"?

2. If so, is an exception to the act of state doctrine created, under *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's co-defendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?

Statement

On September 15, 1960, several Cuban manufacturers of cigars were nationalized by the Republic of Cuba. Before and for a short time after nationalization (or "intervention"), cigars manufactured by these manufacturers were shipped to three principal importers in the United States ("the importers"), including Petitioner ("Dunhill"). Most of the cigars shipped after intervention were not paid for, but several payments, intended to cover amounts owed for pre-intervention shipments, were made by the importers after intervention.

Lengthy litigation ensued. In early 1961, these former owners ("the owners"), who fled to the United States and elsewhere, sued the importers to obtain payment on all cigars shipped both before and after intervention, and sued both the importers and the Cuban government for infringing their United States trademarks applicable to the cigars. The Cuban agents appointed to manage the nationalized businesses, called "interventors," also sought (by attempting to intervene in the owners' actions) to recover for all cigars shipped by the importers.

Holding in abeyance the actions against the importers, the District Court resolved the threshold disputes between the interventors and the owners by holding that (1) the owners could prosecute claims for trademark infringement, and (2) the interventors could recover for post-intervention shipments. These holdings were affirmed on appeal. *Palicio* v. *Brush & Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967). See J. App., 5a-6a.

During the *Brush & Bloch* litigation, it was assumed by all the parties that only insignificant post-intervention payments had been made for pre-intervention shipments. Not until after the respective rights of the owners and interventors had been established by *Brush & Bloch* did it become apparent that those assumptions were incorrect. J. App., 43a-44a. Discovery revealed that substantial amounts were involved and that those payments might well have found their way into the hands of the interventors. During the trial the importers, including Dunhill, claimed a right to recover against the interventors for any such moneys that the importers might eventually be held to owe the owners. J. App., 45a.

The interventors' principal line of defense to this claim of the importers was to dispute that they ever received the payments. J. App., 20a-22a and 46a. During the course of

trial, as proof was adduced that the interventors *had* actually received these payments, counsel for the interventors suggested that his clients would not honor a claim for repayment of those funds. This suggestion the Court of Appeals turned into an "act of state." Apart from counsel's statements, not a shred of evidence was adduced at trial or before the Court of Appeals to support counsel's contention that any act of the Cuban government had taken place with respect to the funds at issue.

The District Court found that the payments for pre-intervention shipments had, in fact, been received by the interventors. The court held that the importers were nevertheless liable to the owners for those amounts, with interest. It also held that the importers could recover those amounts, with interest, from the interventors. The other two importers, who owed larger sums to the interventors than they had mistakenly paid them, recovered these amounts by way of set-off. Dunhill, having paid more to the Cuban government's agents for pre-intervention shipments than it owed for post-intervention shipments, recovered an affirmative judgment against the interventors for the difference. J. App., 73a-75a. That difference was substantially less than the net balance found owing from the other importers to the interventors. J. App., 44a-45a. Dunhill's post-trial motion to obtain the affirmative judgment was not opposed by the interventors. J. App., 74a-75a.

The Court of Appeals for the Second Circuit reversed the holding of the District Court insofar as it granted Dunhill an affirmative judgment. In effect, it required Dunhill to pay twice for the same merchandise and allowed the interventors to retain money to which they had been held clearly not entitled. The sole ground for the reversal by the Court of Appeals was its view that it was bound to recognize an act of state by the government of Cuba to bar such affirmative relief. However, relying on *First National*

City Bank v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), the Court also held that the act of state doctrine barred consideration of the importers' counterclaims against the interventors only to the extent they exceeded the judgments which the Cuban interventors had, in turn, recovered against the importers. J. App., 28a-31a. Thus, the judgment was reversed only as to Dunhill, which alone had obtained an affirmative judgment against the Cuban interventors. And of what did this act of the Cuban state consist? Nothing other than unsubstantiated statements of counsel for the interventors that they would not pay any judgment against them ordered by the Court.

Summary of Argument

I. An in-court statement of counsel cannot constitute an "act of state." Any "act of state" includes two distinct elements, both of which are lacking here: First, the act must be a public act of a recognized foreign sovereign, and, second, the act must be committed within that sovereign's own territory. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). In all previous cases before the court, there has in fact been such a public act within the sovereign's own territory. It is such acts, and only such acts, which the courts may be required to respect in rendering judgment.

The in-court statements of counsel are not the public act of a sovereign and clearly did not take place within the sovereign's territory. Counsel's remarks were no more than statements of his litigating position. To allow such statements to be deemed an act of state would render foreign sovereigns immune to adverse judgments in our courtrooms.

This Court has recently explored at length the bases for and appropriate application of the act of state doctrine.

In *Sabbatino* it suggested that the *major* consideration in applying the act of state doctrine to a given case is the relative competency of the political versus the judicial branches of the government to consider an issue that may affect the foreign relations of the nation. If the act of state to be respected is a decree, an order, some action of a sovereign within its own territory, the political branches may well be more competent than the judicial to judge if those acts should be respected. In such cases, justification exists for the application of the act of state doctrine. However, this case raises no sensitive political issues requiring the court to defer its decision to the political branches. It is a commercial case, in which a foreign government's agents have invoked the processes of our courts and can and should be required to abide by their judgments.

To decide against the respondent will in no way cause affront to the Cuban government; its agents entered our courts seeking an adjudication of entitlement to payment for shipments of tobacco they claimed to own. To permit application of the act of state doctrine here could have a major unsettling effect on international transactions which are increasingly made with commercial agencies of foreign governments. It would establish the precedent that after invoking the aid of our courts to seek relief, such agencies could with impunity in mid-trial call a halt to the proceedings when their counsel thought it expedient. Nothing this Court has ever had to say on the act of state doctrine supports such a rule.

II. Assuming, *arguendo*, that the act of state doctrine was properly invoked, Dunhill is, nevertheless, entitled to recover the full amount of its counterclaim. The exception to the act of state doctrine, created by *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), is applicable to the case at bar. Indeed, the facts here present an even stronger case for judicial consideration of a defendant's counterclaim.

There is no danger that a judicial determination of Dunhill's counterclaim would embarrass American foreign relations. The Cuban government selected the American courts in which to adjudicate its dispute with Petitioner. As far as the record discloses, that government has taken no political act challenging the competency of our courts to render judgment in this commercial matter. And there has been absolutely no indication from our Department of State that delicate foreign relations will be disturbed by an adjudication of the issues presented here.

To the extent the Executive Department has expressed any sentiment relevant to this case, it suggests strongly that Dunhill's counterclaim must be heard. In *First National City Bank*, the courts relied on a letter of Legal Advisor Stevenson denying executive objections to adjudication. The letter itself states that the policy expressed therein applied to the First National City Bank dispute and to "like cases." *See Banco Nacional de Cuba* v. *First National City Bank*, 442 F.2d 530, 538 (2d Cir. 1971), *rev'd* 406 U.S. 759 (1972).

In any event, granting Dunhill the remedy it seeks will not result in enforcing an affirmative judgment against the Cuban government. Cuba has submitted for judicial resolution claims that are greatly in excess of the counterclaims against it. Since the claims and counterclaims all arise out of the same subject matter, the equities for allowing the counterclaim in full are even more strongly with Dunhill than they were with the defendant in *First National City Bank*. All such a judgment will do is to avoid the unfair and surely anomalous result of requiring Dunhill to pay twice (with interest) for the same goods because of a dispute between a foreign government and its own former citizens.

ARGUMENT

I.

The in-court statements by counsel that the Republic of Cuba would not honor the importers' unjust enrichment counterclaims did not constitute an act of state.

The first issue is whether or not the in-court statements by counsel for the Republic of Cuba that his client would not honor Petitioner's claim for repayment of funds, absent any further evidence of some official act of the political sovereign of that nation, can constitute an act of state. We respectfully submit that such statements lack the essential elements of an act of state and that clothing such statements with the mantle "act of state" would not serve the fundamental purpose underlying the doctrine. Accordingly, those statements should not be deemed to constitute an act of state.

A. Counsel's in-court statements lack two essential elements of an act of state: they were not public acts of a recognized sovereign, nor were they made within the territorial jurisdiction of a foreign sovereign.

Most probably having its genesis early in our history [*see Hudson* v. *Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808); *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812)], the act of state doctrine has more recently been applied with increasing frequency to the expropriatory acts of foreign governments, including the Respondent, Republic of Cuba. In general terms, it seems agreed that the doctrine is "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal government." *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972). Since, however, application of the doctrine results in abstention by the courts from deciding cases and controversies otherwise properly before them, this Court also has recognized that:

> "The act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rule appropriate for decision from among various sources of law including international law." *Id.*, 406 U.S. at 763.

Although there may exist some uncertainty as to the precise circumstances under which the act of state doctrine will be applied, the essential elements of an act of state have been set forth clearly and repeatedly both in this Court and elsewhere. The classic formulation of the doctrine was enunciated by the Court in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). In recognizing the validity of certain acts of a revolutionary Venezuelan military commander whose government had been later recognized by the United States, the Court said:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." 168 U.S. at 252.

These elements were restated by the Court in *Sabbatino* as follows:

> "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964).

These essential elements—(a) that there be a public affirmative act of a recognized sovereign and (b) that such an

act be committed within the sovereign's own territory—have been consistently regarded as the *sine qua non* of an act of state by case and commentator alike.*

Moreover, every other case thus far which has applied the act of state doctrine has in fact involved an affirmative, public act by a foreign governmental authority within its territorial jurisdiction. Often the affirmative step consists of an executive decree, as in *Banco Nacional de Cuba* v. *First National City Bank*, 270 F. Supp. 1004, 1009 n.6 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970); *vacated and remanded*, 400 U.S. 1019 (1971); *adhered to on remand*, 442 F.2d 530 (2d Cir.); *rev'd*, 406 U.S. 759, 760 (1972); in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401-05 & nn. 3 & 7 (1964); and in *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 51, 242 N.E.2d 704, 707 (1968). In other cases, the act is legislative in nature. *E.g.*, *Eastern States Petroleum Co.* v. *Asiatic Petroleum Corp.*, 28 F. Supp. 279 (S.D.N.Y. 1939); *see* 2 D. O'Connell, International Law 874-76 (1965). Occasionally (as in times of civil strife), the step is not formal. But even in such cases there is always an affirmative step evidencing the intentional use of sovereign power. *See, e.g.*, *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) (house arrest by military commander during civil war); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918) (forcible seizure of property by military commander during civil war); and *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918) (same).

* *United States* v. *Pink*, 315 U.S. 203, 233 (1942); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303 (quoting *Hernandez*) (1918); *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 52, 242 N.E.2d 704 (1968). *See also The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 284 (1972); Note, *Act of State*, 14 Harv. Int'l L.J. 131, 133 (1973); Recent Developments, *The Act of State Doctrine*, 8 Texas Int'l L.J. 271, 274 (1973); Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1608-09 (1962); 12 A.L.R. Fed. 707, 732.

And in those few cases where the specific issues were raised as to whether the "act" was a public expression of a sovereign or was committed in its territory, the courts have insisted that both requirements be met. Thus, in *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), appellant claimed that the designation of certain ports as "safe" for its ship constituted an act of state, and thus it was relieved of liability for damage to the ship. The Second Circuit, relying on the formulation of the act of state doctrine in *Sabbatino*, concluded that:

> "designation of the ports as safe was not an act performed within the territory of Spain, nor was it performed by the Government of Spain. . . . Appellant's act of state argument is therefore considerably wide of the mark." 336 F.2d at 363.

Similarly, in *Menzel* v. *List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966); *mod. on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dept. 1967); *rev'd on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742 (1969), where it was alleged as a defense to a replevin action that the previous requisition of a painting by the Nazis was an act of state the legality of which could not be questioned, the court held, *inter alia*, that since the painting was taken in Brussels, it was not an act of state because it was "not [done] within its own territory." 49 Misc. 2d at 311, 267 N.Y.S.2d at 815. *See also* 14 Harv. Int'l L.J. 131, 133 (1973); 12 A.L.R. Fed. 707, 775-76.

Here, there was no proof of *any* act by the Cuban interventors or any other responsible authority of the Republic of Cuba. Whatever the evidentiary worth of counsel's statements that his client would not honor the importers' claims, they proved nothing more than the fact that Cuba was not affirmatively assuming an obligation it was contest-

ing in court. Assuming, *arguendo,* that counsel's statements could prove anything, they pointed to no affirmative exercise whatsoever of the sovereign power of a foreign country within its territory, as had been required by every decision heretofore.

Once before the Second Circuit held that an in-court statement constituted evidence of a sovereign act; that holding was reversed by this Court. In *Compania Espanola de Navegacion Maritima* v. *The Navemar,* 303 U.S. 68 (1938), a verified statement by the Ambassador of Spain that his country had taken possession of a vessel was filed in court. The Court of Appeals of the Second Circuit had held on the basis of that statement that the vessel was immune from judicial process. This Court held such a statement not proof of a sovereign act.

If a foreign plenipotentiary's formal and verified statement is not competent evidence of a sovereign act within its territory, surely counsel's litigating position should not constitute conclusive proof of such an act. The Court below dwelt at length on the fact that an act of state need not be formal, but that fact does not obviate the requirements that there must be some public, affirmative act, that the act be that of a government official within the sovereign's territory, and that there must be competent proof of the act. All these elements are lacking here.

B. The fundamental policy underlying the act of state doctrine would not be served by expanding it to encompass counsel's in-court statements.

In Point A, *supra,* we demonstrated that attributing act of state status to counsel's in-court statements clearly would be contrary to both the language and the holdings of decisional and other authority. We submit further that such an expansion of the act of state doctrine would not serve its fundamental purpose as enunciated by this Court in its most recent decisions dealing with the doctrine.

The courts have offered various rationales for application of the act of state doctrine. The earlier cases suggested that the application of the doctrine was compelled by the inherent nature of sovereign authority. *See Underhill* v. *Hernandez,* 168 U.S. at 252; *Oetjen* v. *Central Leather Co.,* 256 U.S. at 303-04. However, the Court in *Sabbatino* explicitly rejected so broad a justification for the doctrine:

> "We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority . . . or by some principle of international law." 376 U.S. at 421.

The *Sabbatino* Court further limited the possible justifications for the act of state doctrine:

> "The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." 376 U.S. at 423.

The Court then set out what it deemed to be the proper rationale for the doctrine:

> "It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." 376 U.S. at 423.

And although there was manifest disagreement in *First National City Bank* concerning the precise circumstances under which the act of state doctrine should be applied, all of the Justices there agreed with *Sabbatino* that the doctrine's:

> "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."

First National City Bank v. *Banco Nacional de Cuba*, 406 U.S. at 763 (Rehnquist, *J.*); *id.* at 774 (Powell, *J.*, concurring); *id.* at 772 (Douglas, *J.*, concurring); *id.* at 785 (Brennan, *J.*, dissenting).

We submit, therefore, that expansion of the act of state doctrine to encompass in-court statements of counsel as in the case at bar should be undertaken only if required by the respective roles of the judiciary and the executive in the area of international relations or foreign affairs. We submit further that analysis demonstrates no conceivable justification for such a result. On the contrary, the five factors suggested by the Court in *Sabbatino* as bearing on the relative competencies of the political and the judicial branches in this area show conclusively why a public act of a recognized foreign sovereign committed within its own territory is necessary for the application of the act of state doctrine, and thus why the in-court statement of counsel cannot be deemed such an act of state:

1. *Embarrassment to U.S. Foreign Relations.* In *Sabbatino*, the Court stated:

> "It is . . . evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428.

The Court suggests that the act of state doctrine rightly is invoked where the judicial branch is called upon to rule on difficult political issues beyond its competence and where "the very expression of judicial uncertainty might provide embarrassment to the Executive Branch." 376 U.S. at 433. This *might* have been the situation in the instant case if evidence had been presented which pointed to some act of the Cuban government such as a law or decree expropriating Dunhill's money held by Cuba or repudiating Dunhill's claim for its return. However, it is hard to see

how disregarding the statement of counsel, which statement was not backed by *any* evidence whatsoever of a governmental act, can in any way exacerbate foreign relations or embarrass our government. To allow the statement of counsel, absent any other sovereign act, to be deemed an act of state is to have the courts anticipate a sensitive political issue where in fact one may not exist.

2. *Affront to Foreign Governments.* Another consideration in applying the act of state doctrine is the avoidance of offense to other nations. The Court stated in *Sabbatino*:

> "Such decisions [as validity of title to property] would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep-seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders." 376 U.S. at 431-32.

Absent evidence of some conscious act by the Cuban sovereign that would be disregarded, a decision allowing petitioner to recover on its counterclaim should do little to embarrass the Cuban government. Indeed, the Cuban government has never formally interposed a defense based on its internal law with respect to this matter. When Dunhill recovered a claim against the interventors in the District Court greater than the interventors' award against Dunhill, the District Court, by oversight, failed to grant an affirmative judgment for Dunhill. Dunhill moved to correct this. If any act of state had occurred which precluded compliance with any relief that might be ordered, that was the point in the proceedings at which the inter-

ventors should have raised such opposition. Yet, as the Court noted in granting Dunhill affirmative relief.

> "The interventors have submitted no papers in opposition and do not appear to oppose this application." J. App., 74a.*

Further, it can hardly be an affront to a foreign sovereign to prevent its unjust enrichment at the expense of an innocent third party when the sovereign has itself selected the forum in which to litigate the issues. As suggested by the Court in *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955):

> "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." 348 U.S. at 361-62.

If Cuba is willing to present to the U.S. courts the issue of its entitlement to compensation for shipments, it should be no affront to its sovereignty that related claims are adjudicated and recoveries applied to their satisfaction—particularly in light of the equities here present.

3. *Uncertainty in International Trade.* The Court in *Sabbatino* stated:

> "Another serious consequence . . . would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade." 376 U.S. at 433.

To recognize the statements of counsel as an act of state would not avoid serious alterations to the flow of international trade; it could cause such alterations. For if a statement of counsel is recognized as an act of state, any dispute arising out of a commercial transaction with a foreign government can be immunized from full judicial review in the courts of the United States. We are entering an era marked by a vast increase in commercial dealings between United States nationals and foreign governments—often involving transactions of massive proportions. Under the holding of the Court of Appeals, in disputes arising out of such transactions, our courts will be available to grant relief against the American national, but, with a word from opposing counsel, not in his favor. This is distinctly contrary to current trends in decided cases and to the views of the executive departments. *See infra*, pp. 18-20.

4. *Ease of a Judicial Remedy.* The Court in *Sabbatino* suggested that where the chances for effectuating a judicial remedy are slight, there is reason to invoke the act of state doctrine. 376 U.S. at 431. This was but another way of saying that where sensitive political issues are involved in the adjudication of a case, a court's decision might have no practical impact. This would only embarrass all concerned and denigrate the courts. However, in the instant case, this Court can reach a decision which is easily implemented. A decision for Dunhill would simply permit it to set off the amount of its counterclaim from the pool of funds which the other importers in the instant case owe to the Cuban government.

5. *Codification or Consensus Concerning Law.* The Court stated in *Sabbatino*:

> "It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . ." 376 U.S. at 428.

---

* The interventors also could have expressed such opposition in their reply to Dunhill's amended answer, which expressly set forth a counterclaim seeking this judgment. Appendix, pp. 14-18. Although given the opportunity to file such a reply (*Id.*, pp. 19-22) they failed to do so.

The instant case concerns commercial transactions by government agencies. It is a dynamic area of the law, in which concepts of amenability to suit and responsibility for the payment of judgments have been increasingly accepted by all countries. Unlike the situations in *Sabbatino* and *First National City Bank*, in which the validity of a politically sensitive expropriation was involved, no such issue is before the Court in the instant case. Rather the sole issue is Cuba's right to keep the proceeds of Dunhill's payments to which the courts below have found Cuba was never entitled.

There is no better reflection of the current law on the legal responsibilities of foreign states in commercial activities than legislation sponsored by the State and Justice Departments now pending before the Congress which seek to codify what has become United States and general international practice.* These bills would (a) codify into law the so-called "restrictive theory" of sovereign immunity, which the United States has followed since 1952,** and clearly render commercial agencies of foreign governments, such as the interventors here, amenable to suit in the United States in connection with commercial transactions entered into or having an effect within this country, (b) enable litigants not only to obtain valid service on such agencies, but also to obtain execution of judgments against the assets of such commercial agencies, and (c) shift from the executive departments to the courts the responsibility for determining whether claims of immunity from suit or execution of judgment are to be recognized. Cases now abound in which the courts of this country have adjudicated claims against commercial agencies or entities of foreign governments. It is the rare case that attracts attention from the press and commentators in which the

* S. 566 and H.R. 3493, 93d Cong., 1st Sess. (1973).

** *See* Statement of Hon. Charles N. Brower, Legal Advisor Department of State. *House Judiciary Committee Hearings on H.R. 3493*, 93d Cong., 1st Sess. at 15 (1973).

United States government presses claims of immunity for a foreign government.* But this well-defined trend and its proposed codification would be wholly emasculated if it could be easily evaded through the spontaneous, unsupported assertions of litigation counsel that their clients will refuse to pay judgments the courts render.

C. Permitting counsel's statements to constitute an "act of state" would allow foreign states to claim immunity in cases in which the defense of sovereign immunity would not be recognized.

In this case, the Court of Appeals in effect granted Cuba the sovereign immunity it could not otherwise effectively plead. The Court simply assumed that Cuba's possible refusal to recognize liability for this claim precluded our courts from requiring Cuba to do so. Yet had Cuba attempted to raise the defense of sovereign immunity, it would have found:

(1) the doctrine is not available with respect to a commercial activity such as the sale of non-governmental goods [*see* S. 566, 93d Cong., 1st Sess. (1973)]; (2) the doctrine is not available with respect to a counterclaim, regardless of amount, arising from the same subject matter as that sued upon; (3) the doctrine cannot be invoked after the merits of the controversy (here, Cuba's receipt of the moneys paid) have been placed in issue; and (4) the doctrine is generally not applied without a suggestion of immunity filed by the State Department at the request of the foreign sovereign, and here, as far as the record discloses, no such request was made by Cuba and no suggestion of immunity was filed by the State Department. To the extent the latter has indicated any views it would allow full adjudication of Dunhill's claim. *See* RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 69, 70(2)(b) and 71(1).

* *See, e.g.*, Note, *Sovereign Immunity—The Case of the "Imias"*, 68 AM. J. INT'L L. 280 (1974); *Rich* v. *Noviera Vacuba*, 295 F.2d 24 (4th Cir. 1961).

To find for the Republic of Cuba in the instant case thus will revive in another guise what has become a limited sovereign immunity doctrine.* In any case in which a foreign sovereign would wish to avoid judgment against it, it could simply have its counsel stand up in a courtroom and state that the sovereign power's position is that it is not liable for payment, and such an action by counsel will be deemed an "act of state." By simply having counsel come forward in court and state a litigating position, his client would be found immune from suit. For such a result there is no precedent, no logic and no justice.

II.

Assuming that the statements of counsel for the Republic of Cuba that Dunhill's unjust enrichment counterclaim would not be honored do constitute an act of state, an exception to the act of state doctrine was created, under *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), where Dunhill's counterclaim does not exceed the net balance owed to Cuba by Dunhill's co-defendants and where all claims and counterclaims arise out of the subject matter in litigation in this case.

Dunhill is entitled to obtain a judgment for the difference between the amount it owed to the interventors and the amount it previously paid to the interventors for pre-intervention shipments. Even if Cuba had acted to bar Petitioner's claim, the opinions of the majority in *First*

* For discussions of the increasingly narrow limits governments and courts have placed on the sovereign immunity rule, *see Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 INT'L LAWYER 408 (1974); *Hearings, supra*, p. 18.

National City Bank indicate the act of state doctrine should not be applied:

> (a) if no embarrassment to American foreign relations will ensue from a failure to do so, and
>
> (b) if its application would be fundamentally unfair.

Both conditions are present in the case at bar. Indeed, the facts of this case are even stronger than in *First National City Bank*.

A. The court is not barred by the act of state doctrine from considering Dunhill's counterclaim where such consideration will not interfere with American foreign relations.

It is obvious that the question of unjust enrichment being litigated in this case is not a political one. Rather, the issue is virtually identical to the other issues which Cuba voluntarily submitted for judicial resolution by the courts of the United States. The context of this case is purely commercial; there has been no political act by any foreign sovereign; the Cuban government has merely—and belatedly—repudiated an obligation which arose out of a commercial transaction. The concerns of the Court, as reflected in the *Sabbatino* decision, are simply not relevant. This suit is in fact and law an ordinary commercial litigation in which the plaintiff, suing on a series of claims, should be subject to all of the counterclaims asserted by the defendants arising out of essentially the same series of transactions. As this Court has noted, the cases which establish the act of state doctrine

> "[justify] its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government." *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. at 765.

That consideration is wholly inapposite here. The liability of the parties has already been fully litigated. Neither the Cuban government nor the political branches of our government have taken any official steps to suggest to the courts that the issues presented are inappropriate for judicial determination. Compare the situation in the case of the "Imias"*, in which both governments showed no hesitation about representing to the court that it should keep its hands off.** Allowing Dunhill to set off its counterclaim against the payments its co-defendants are to make will not involve the Court in the question of the validity of a foreign sovereign's acts. It will not "interfere with delicate foreign relations conducted by the political branches." *Id.*, 406 U.S. at 775 (Powell, J., concurring).

The plurality opinion in *First National City Bank* held that "where the Executive Branch . . . expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." 406 U.S. at 768. While that case was pending, the Court received a letter from the State Department advising that

> "the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." *Banco Nacional de Cuba* v. *First National City Bank*, 442 F.2d 530, 538 (2d Cir. 1971), *rev'd on other grounds*, 406 U.S. 759 (1972).

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* *Industria Azucarera Nacional & Compania de Refineria* v. *Empresa Navegacion Manbisa* (Civ. No. 7902, D.C.Z. Nov. 1, 1973), noted in 68 AM. J. INT'L L. 280 (1974).

** In *Republic of China*, the Court pointed out that "the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit. . . . Its failure or refusal to suggest such immunity has been accorded significant weight by this Court." *National City Bank* v. *Republic of China*, 348 U.S. at 360.

Although no comparable express representation has been received by the courts in this case, the rationale of Legal Advisor Stevenson's letter and the Court's acceptance of it would seem to apply precisely to this "like case."

B. Fundamental considerations of fairness require that the Court allow Dunhill to set off its counterclaim against the amounts owed to Cuba by its co-defendants.

Sovereign immunity and act of state are court-imposed limitations on their ability to do justice. Accordingly, these doctrines are construed narrowly. They may require individuals to forego adjudication of their otherwise legally cognizable claims to prevent judicial interference with foreign policy. But in an era marked by a vast increase in commercial transactions between American nationals and foreign sovereigns, the Court should not allow these doctrines to become devices by which foreign sovereigns can repudiate their commercial obligations with impunity. The executive has indicated its position in this case—by making no protest to the courts; the legislature is considering S. 566 and H.R. 3493 by whose principles this case is clearly governed. *See, supra*, p. 18. A denial of Dunhill's full counterclaim would be a judicial deviation from this well marked path. It would require an unnecessarily broad application of the act of state doctrine.

More than that, it would be patently unfair if Cuba could collect the amount owed for the post-intervention shipments without subjecting itself to liability for the money it mistakenly received for pre-intervention shipments. As this Court has previously held in *Republic of China:*

> "a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity." 348 U.S. at 364.

The claims and counterclaims being litigated in this action arise out of the same subject matter and involve parallel situations. They all have been tried in the same suit. The Cuban government raised no objection when the suits were consolidated for trial and in fact had the benefit and convenience of litigating a single suit. As Judge Mansfield pointed out in the court below:

> "[S]ince the counterclaim here . . . arises out of a course of dealing with respect to the same subject matter . . . between the same parties or their successors . . . the equities here balance much more heavily in favor of the importers than in the *First National City Bank* case where the counterclaim arose out of a wholly unrelated factual context." J. App., 30a.

Furthermore, the counterclaims which arise out of the same subject matter as Cuba's claims clearly do not exceed the amount of the claim voluntarily put in controversy by the Cuban government, thus avoiding the situation which concerned this Court in *Sabbatino*.* Allowing Dunhill to recover its full counterclaim will not frustrate the aim of the act of state doctrine. Cuba has put an amount of almost $700,000 in controversy in this suit. The doctrine of *First National City Bank* authorizes counterclaims up to that amount.

It cannot be argued that Dunhill will receive a windfall if the Court allows a recovery. It has already been resolved that Dunhill is entitled to recover the money mistakenly paid to Cuba. Furthermore, it has also been resolved that the owners are entitled to payment by Dunhill for the pre-intervention shipments. To the extent that Dunhill cannot recover on its counterclaim, it will be forced

* Cuba's claims against the importers total $699,788.56. J. App., 44a. The total amount of the unjust enrichment counterclaims is $477,200. J. App., 45a.

to pay twice—with interest—once to the owners and again to the interventors. Conversely the interventors will be entitled to retain funds the courts correctly held were paid to them by mistake. The fundamental unfairness of such a result is clear.

C. The Stevenson letter supports the conclusion that an adjudication of Dunhill's counterclaim should not be barred by the act of state doctrine.

The plurality opinion in *First National City Bank* relied heavily on a letter from the State Department authorizing judicial resolution of the counterclaim then before the Court. The conclusion expressed in that letter is applicable no less to the instant case.

The letter itself extends beyond the immediate case to "like cases." *Banco Nacional de Cuba* v. *First National City Bank*, 442 F.2d at 538. It was clearly the opinion of the State Department that American foreign policy did not require restricting the letter's applicability only to the case then at bar.

Furthermore, the case currently before the Court presents an even stronger argument for the application of the policy expressed in that letter. The commercial nature of the transaction, the absolute impossibility that the decision will interfere with foreign relations or embarrass the Executive Branch, and the willingness of the Cuban government to submit to American courts the resolution of its claims arising out of the same subject matter—all these factors make this case even more appropriate than *First National City Bank* for an adjudication of Dunhill's counterclaim without the constraints of the act of state doctrine.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Second Circuit be reversed insofar as it reversed in part the judgment entered in favor of Petitioner, Alfred Dunhill of London, Inc., against the Respondents, the Republic of Cuba and Daniel Solano Pinera, as Interventor.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

—against—

THE REPUBLICA OF CUBA and DANIEL SOLANO PINERA, As Intervenor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

—against—

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, As Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

1. Was the petition for certiorari improvidently granted in that

(a) under the applicable Cuban Assets Control Regulations (31 C.F.R. § 515 et seq.) there are no assets on which an affirmative judgment for petitioner could be executed;

(b) the questions posed by this Court in granting the petition cannot be briefed on the record in this case because they make assumptions which have no foundation, and

(c) the petition herein raises but a few of a number of closely interlocking issues in a complex litigation and an adequate review of the issues herein is not possible in isolation from the questions raised in other petitions for certiorari pending in this Court. See *Republic of Cuba, et al.* v. *Menendez, et al.*, No. 73-1287, and *Saks and Company, et al.* v. *Republic of Cuba*, No. 73-1289.

If the writ be not dismissed, the proper questions for presentation on the merits are as follows:

2. Does the course of conduct engaged in by respondents in accepting, in Cuba, the payments made by petitioner and in refusing to repay, under a claim of entitlement based upon a valid nationalization decree, constitute an act of state within the doctrine of *Banco Nacional* v. *Sabbatino*, 376 U.S. 398?

3. If so, should there be an exception to the act of state doctrine which would permit petitioner to obtain any judgment on a counterclaim? If such exception is to be made, should it be further extended to allow an affirmative judgment where judgment on said counterclaim does not exceed the total net balance owed to Cuba on its claims against other defendants in other actions when said claims arose out of transactions similar to those on which petitioner's counterclaim is based and when the cases of petitioner and said other defendants were consolidated for purposes of trial only?

Counter Statement of Facts

By decree dated September 15, 1960 four Cuban-owned cigar manufacturers which had been selling cigars to petitioner were nationalized (or "intervened") and their assets

were taken over by the government-appointed interventor, respondent Daniel Solano Pinera. For about four months thereafter petitioner continued to purchase cigars from the interventor, most of which were not paid for. Early in 1961 the four dispossed Cuban owners of the cigar factories sued petitioner, in four separate actions, for cigars which, they claimed, had been delivered to petitioner but not paid for, and for trademark infringement.

Before any further proceedings could be taken in those cases, the interventor sued the former owners for a determination of the respective rights of the parties to the purchase price of the cigars and the use of the trademarks. In that action, entitled *Palicio* v. *Brush and Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F. 2d 1011 (2nd Cir. 1967), *cert. den.*, 389 U.S. 830 (1967), the court held that the nationalization decree did not raise any question of international law, and that the interventor was entitled to the purchase price of the post-intervention shipments of cigars, but that he did not own and could claim no rights under the trademarks. Pending the decision in the *Palicio* case, the original four actions by the former owners against petitioner were held in abeyance.

Following the decision in *Palicio*, the district court consolidated the four actions against petitioner, and permitted the respondents to intervene therein to press their claims against petitioner for the post-intervention shipments.[1]

Up to this point (May 16, 1967) and for several months thereafter, neither petitioner nor respondents nor the District Court, were aware that the former owners had a substantial claim against petitioner arising from the pre-intervention sale of cigars and therefore none of the parties

1. There is no dispute as to respondents' right to payment for post-intervention shipments.

anticipated the issue now before this Court. As a result of discovery proceedings and other steps taken in connection with preparation for trial, the following picture, not foreseen in the *Palicio* litigation, developed:

(1) There were substantial pre-intervention shipments of cigars to petitioner for which the former owners had not received payment, and for which they claimed payment from petitioner.

(2) Petitioner claimed to have paid respondent-interventor for such shipments, and argued that the former owners, by their conduct, had forfeited any right to payment.

(3) The respondents claimed that they were entitled to payment for the pre-intervention shipments because the nationalization decree of September 15, 1960 had nationalized all assets of the cigar companies, including accounts receivable.

The district court disposed of these issues by holding that:

(a) the former owners, and not the interventor, were entitled to payment from petitioner for pre-intervention shipments;

(b) the former owners were not estopped from claiming such payment;

(c) the petitioner had paid the respondent-interventor for pre-intervention shipments by mistake;

(d) the respondents were therefore obligated to return to petitioner the money paid by mistake;

(e) since the amount of the pre-intervention payments by petitioner exceeded by $53,000 the amount due to Cuba for post-intervention shipments,

the district court directed an affirmative judgment in favor of petitioner against respondents for that sum.

On appeal, the Court of Appeals considered all of the above issues and several others and sustained the district court as to all of the issues except (e). As to that issue, the Court of Appeals held that an affirmative judgment was not proper. All of the other issues in the case (a, b, c and d above, as well as a number of others) are the subject of two other petitions for writs of certiorari pending before this Court (Nos. 73-1287 and 73-1289). No action has been taken by the Court on those petitions.

Relevant Regulations

Relevant portions of the Cuban Assets Control Regulations, 31 C.F.R. § 515 et seq. are set forth in Appendix A hereto.

Summary of Argument

I. The petition for certiorari was improvidently granted and the writ ought now to be dismissed because:

(1) Under the provisions of the Cuban Assets Control Regulations, 31 C.F.R. § 515, et seq., there are no assets of Cuba against which the petitioner can collect any affirmative judgment it may secure in this case. Hence, although a justiciable question is presented, the case is moot so far as any practical benefit to petitioner is concerned;

(2) The questions put by this Court in its order of May 13, 1974 granting the petition for certiorari are not raised by the record and hence cannot be briefed except as abstract academic inquiries. In addition, the meaning of the second question posed by this Court is unclear, but it seems to be based upon an inaccurate assumption, namely,

that this Court in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (hereinafter "*Citibank*"), adopted some sort of "counterclaim exception" to the act of state doctrine;

(3) The Court, in granting this petition, left undecided two companion petitions which raise questions of law which interlock with those in the instant case. The Court's action results in uncertainty as to what effect a decision on this petition will have on the entire controversy, and raises the possibility of long-continued litigation before final resolution can be had.

II. On the merits, this record properly raises the question of whether the course of conduct followed by respondent Republic of Cuba constitutes an act of state under the doctrine of *Banco Nacional de Cuba* v. *Sabbatino* 376 U.S. 398. Respondent urges that Cuba's receipt of monies paid to it and its refusal to surrender those monies in reliance on its interpretation of the decree of the Cuban government which nationalized Cuban-owned tobacco factories, constitutes a classic act of state, the validity of which cannot be reviewed by the courts of the United States.

III. Contrary to the suggestion which may be contained in the second question put by the Court, there is no exception to the act of state doctrine which will permit petitioner even to maintain its counterclaim, much less to secure an affirmative judgment on it. A majority of this Court in the *Citibank* case, *supra*, expressly disapproved any counterclaim exception to the rule set down in *Sabbatino*. Even those members of the Court who advocated a counterclaim exception expressly disapproved any rule which would permit an affirmative judgment on such a counterclaim. There is nothing in this record to justify an extension of a counterclaim exception (which exception was expressed most clearly in the concurring opinion of Mr. Justice Douglas in the *Citibank* case) to permit an affirmative judgment here. The mere fact that several separate and independent cases were, as a matter of convenience, tried jointly does not permit petitioner to measure its recovery against the aggregate of judgments secured in all the cases to determine whether its judgment is "affirmative".

The granting of a counterclaim exception and the expansion of that exception to include petitioner's claims here will result in the frustration of Congressional and Executive intent in devising a program for the marshalling of Cuban assets.

ARGUMENT

POINT I

The writ of certiorari was improvidently issued and should now be dismissed.

We respectfully suggest to this Court that the petition for a writ of certiorari granted on May 13, 1974 in this matter was improvidently granted, and that the writ should be dismissed for three reasons:

A. The Issue Presented By This Writ Is, In Practical Terms, Moot So Far As Petitioner Is Concerned.

The district court awarded petitioner, on its counterclaim, an affirmative judgment of about $53,000 plus interest over and above the amount of respondents' claim against petitioner. The Court of Appeals, in affirming the district court generally, reversed as to that single item. The question before this Court therefore is whether petitioner shall have judgment in its favor against the respondents in said sum.

Although a theoretical question of law is presented by the record this issue is, in practical terms, moot as to petitioner because for the foreseeable future, and perhaps forever, there is no way in which petitioner can collect on that judgment.

A short review of the background of the handling of claims of United States nationals against other foreign countries is in order. Although there has been no agreement or settlement with Cuba, there is enough history to establish clearly the relevant policy of the United States with respect to this subject.

The techniques adopted by our government to settle foreign claims has historically consisted of three steps, the second and third of which may be taken in reverse order.

(1) The assets of the foreign country and its nationals in the United States have been frozen, subject only to a license issued by the Treasury Department. Executive Order No. 8389 of April 10, 1940, set down as a note to 12 U.S.C. § 95a; 31 C.F.R. § 500 et seq. A similar regulation has been promulgated freezing Cuban funds, 31 C.F.R., § 515 et seq.; see Appendix A to this brief.

(2) Congress has provided machinery for the registration of claims by American citizens against the nationals of the foreign power in question and for the payment of those claims out of the frozen funds, 22 U.S.C. § 1621 et seq. Similar machinery has been set up in the case of Cuba, 22 U.S.C. § 1643 et seq, except that in the case of Cuba there is no agreement for the payment of claims and the statute makes no provision for payment.

(3) A treaty or executive agreement has been entered into between the United States and the foreign power. The

prototype of such an agreement was the Litvinov Agreement with the Soviet Union in 1933; since World War II a series of similar agreements have been entered into between the United States and other countries which have nationalized property owned by United States nationals. See Executive Agreement between United States and Bulgaria, 1963, 14 U.S.T. 969; Executive Agreement between United States and Poland, 1960, 11 U.S.T. 1953; Executive Agreement between United States and Rumania, 1960, 11 U.S.T. 317; Executive Agreement between United States and Yugoslavia, 1948, 62 Stat. 2658, T.I.A.S. 1803; Executive Agreement between the United States and Italy, 1947, 61 Stat. 3962, T.I.A.S. 1757.

This third step, of course, is missing in connection with claims against Cuba.

From the point of view of the United States, this policy can be effectuated only if (1) the collection of claims by nationals of the United States against foreign countries outside the machinery provided by the joint action of the Executive and Legislative Branches is prohibited, and (2) the integrity of the frozen funds is maintained to the greatest extent possible. The first of these conditions has been accomplished in the past by providing, in the relevant executive agreement, that the United States waives any claims any of its citizens may have against the foreign sovereign. Such provisions have been included in each of the treaties mentioned above. This makes it impossible for a creditor to proceed directly against the sovereign and the only way in which he can collect is through the distribution of the frozen funds by the Foreign Claims Settlement Commission.

The second condition has been accomplished by the policy of the Treasury Department in refusing the free

grant of licenses for the release of frozen funds. See *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106 (2d Cir. 1966), *cert. den.* 385 U.S. 898.

After the petition was granted in this proceeding, we were advised by counsel for the petitioner that he had discussed with the Acting Director of the Office of Foreign Assets Control (the representative of the Department of Treasury charged with enforcing the Regulations) the possibility that any judgment issued in favor of the petitioner could be enforced by execution on any assets of the Cuban Government, and specifically on the claim of Cuba against Faber, Coe & Gregg, one of the other tobacco importers. He was advised, we understand, that such a license would *not* be issued. Subsequently counsel for respondents wrote to the Office of Foreign Assets Control to confirm his understanding that such was the policy of the Office. The inquiry was made on July 1, 1974 and an answer was received dated August 1, 1974. Copies of both letters are annexed hereto in Appendix B.

The petitioner here has never filed a claim with the Foreign Claims Settlement Commission, and it is too late to do so now.[2] Instead petitioner has proceeded quite independently to seek the judgment awarded by the District Court. So whether or not petitioner gets a judgment here, if past practice is to be followed it would not be eligible to participate in the distribution of the frozen funds.[3]

2. The deadline was May 1, 1967.

3. The Foreign Claims Settlement Commission reports that 5,911 claims against Cuba, totalling $1,799,548,568.69, have been filed and approved by the Commission. (Foreign Claims Settlement Commission, Annual Report, 1972, p. 412.) There is no recent census of the value of Cuban assets which have been frozen, though a census was taken by the Office of Foreign Assets Control as of the date of the freeze in 1963. It is difficult to analyze that census and

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This is a busy court and it is concerned with important issues. It ought not to devote its energies to the determination of points of law which, however interesting they may be, are in practical terms, academic. Supreme Court Rules, Rule 19(a); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74; Address of Chief Justice Vincent before American Bar Association, Sept. 7, 1949, quoted in Stern & Gressman, *Supreme Court Practice*, 4th Ed., p. 150.

B. The Issues Framed by the Court Are Not Issues Raised By the Record and Cannot Be Intelligently Briefed.

The two issues framed by the Court in its order granting the petition for writ of certiorari are:

> "1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an act of state?
>
> 2. If so, is an exception to the act of state doctrine created, under *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's co-defendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?"

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arrive at a reliable net figure. A total of $148,800,000 of Cuban assets was reported, of which only $19,600,000 was the property of the Cuban Government and its agencies. Even this is a gross, not a net, figure. Much of the balance is in the form of choses in action, which may, or may not, have value. (Treasury Department, Office of Foreign Assets Control, Census of Blocked Cuban Assets in the United States. Undated.)

We most respectfully suggest that neither of these issues can be briefed or argued on this record, as both issues make assumptions which have no foundation.

1. The first question put by the Court would require respondents to defend a legal position they have never advanced at any time in this litigation. Neither the respondents nor the Court of Appeals nor anyone else has ever said that "statements of counsel . . . constitute[d] an act of state" and it is unreasonable to ask respondents to brief that question.

The role of counsel for the Republic of Cuba in this case has been no different from the role of counsel in any other case. Counsel has presented to the Court the legal position of his client. The Republic of Cuba takes the legal position that its conduct in collecting the funds in question from petitioner in Cuba, and in refusing to repay it, on the grounds urged here constituted an act of state (*infra*, p. 16). Counsel did nothing but transmit that view to the district court and to the Court of Appeals. Counsel's role in his case was the same as his role in the *Sabbatino* or *Citibank* cases or any other case before this Court.

The Court of Appeals held that the respondents' conduct constituted an act of state. Respondents shall, in Point II herein, address themselves to that point, although we are not at all sure that this Court issued its writ to review that issue. We canot address ourselves to the point framed by this Court because respondents have never contended that statements of counsel "constituted" an act of state and we respectfully decline to be drawn into a debate over that proposition.

2. The second question put by this Court likewise cannot be briefed:

(1) It assumes an affirmative answer to question 1, which is itself not a proper issue.

(2) It refers to a balance owed to Cuba "by petitioner's co-defendants." Petitioner had no "co-defendants." This case was started in 1961 when four actions were filed, all against petitioner. In 1966, the four actions were consolidated into a single proceeding against petitioner, and respondents were allowed to intervene as parties-plaintiff. There was never more than one defendant in this action.[4]

It is true that this action and two others[5] were tried together in 1969, but no order of consolidation of these three actions was ever entered in the district court. A joint trial was agreed upon for the convenience of the court and counsel, since most of the legal (but not the factual) issues were common to all cases, and the appeal was argued jointly for the same reason. But the defendants in the other cases were in no sense "co-defendants." Each defendant filed separate pleadings; each defendant was represented by its own counsel; each defendant filed its own brief and made its own argument in the district court, and three separate judgments were entered. Only one of the three defendants made this application for a writ of certiorari, although, as is noted above, there is another petition pending (No. 73-1289) in which all defendants have joined.

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4. When the four actions against petitioner were commenced in 1961, a corporate affiliate of petitioner, Dunhill International, Inc. was joined as a party defendant. That affiliate was dropped from the case by stipulation in 1967. We assume that the reference to co-defendants was not intended to refer to Dunhill International.

5. *Menendez et al* v. *Saks & Co.*, 61 Civ. 3336 and *Cifuentes* v. *Faber, Coe & Gregg*, 61 Civ. 472.

(3) The question posed by this Court apparently assumes that some sort of "exception to the act of state doctrine [was] created under *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972)" relating to counterclaims.[6] There was no such exception to the act of state doctrine created by that case or any other. Quite the contrary—this Court refused to create such an exception in the *Citibank* case.

This Court will recall the several opinions in that case. Five justices (BRENNAN, STEWART, MARSHALL, BLACKMUN and POWELL, *JJ*) expressly rejected any counterclaim exception to the act of state doctrine (406 U.S. at 773, 793 *et seq.*) Three justices (BURGER, *CJ* and WHITE and REHNQUIST, *JJ.*) found an exception in the facts of that case, placing primary reliance on a letter written by the Legal Advisor of the State Department. (406 U.S. at 764). No such letter was written here and certainly Mr. Stevenson's letter in the *Citibank* case does not reach the issues in this case. See p. 24 *infra*.

Only one justice, Mr. Justice Douglas, took the position that there was a counterclaim exception to the act of state doctrine. (406 U.S. at 771) With all due respect, we submit that the conclusion reached in his opinion was incorrect.

We will argue in Point III herein that there is, and should be, no counterclaim exception to the act of state doctrine, and that even if there is to be such an exception, it should not be applied here. Here, again, we are not at all sure that this Court issued its writ in order to review that question.

6. The question posed by the Court is somewhat ambiguous, but if the Court is not making such an assumption, the reference to the *Citibank* case is pointless.

C. The Issues in this Case Cannot be Considered Without Some Prior Disposition of the Other Petitions for Writs of Certiorari Relating to This Litigation.

It is clear from a reading of the lengthy opinions below that the legal issues herein[7] are unusually complex and interdependent so that any attempt to separate out any one of them must result in distortion. There are two other petitions for certiorari pending in this Court which raise some of those issues. The failure of the Court to grant or to deny those petitions makes it impossible to consider this petition in proper context.

For example, Cuba urges, in its petition for certiorari (No. 73-1287), that while the Court of Appeals was correct in holding that Cuba's act of state defense was sound, it erred in assuming that the *Citibank* decision had adopted a counterclaim exception to that defense. If Cuba is ultimately successful in its argument that there is no such exception, the present discussion about affirmative judgments is pointless, for Dunhill will not even be entitled to a judgment up to the amount of Cuba's judgment against it.

Equally important is a second petition, filed jointly by petitioner Dunhill and the other importers (Saks & Co. v. Republic of Cuba, No. 73-1289). In *that* petition, Dunhill argues that the former owners are estopped from asserting their right to recover for the purchase price of pre-intervention shipments. Should petitioners be successful in that argument, the former owners will get nothing for pre-intervention shipments and the judgments against Cuba (including Dunhill's judgment here) will fall.

We do not now argue for any particular resolution of those questions; we merely urge that to proceed with this

7. For purposes of this discussion, we will disregard the trade mark issues which are clearly separable from those raised by this petition.

case, while leaving the other questions in abeyance makes no sense at all.

We suggest that a proper resolution of these issues requires either:

1) the granting of all three petitions;

2) the denial of all three petitions;

3) the granting of some petitions and the denial of others.

The Court has adopted a fourth alternative: it has granted one petition and taken no action at all on the others. This could result in endless litigation and prolong for years this lawsuit which is already 13 years old.

POINT II

The Act of State Doctrine bars recovery of a judgment in favor of petitioner.

As we note elsewhere (*supra*, p. 12) the respondents have never contended that the in-court statements of respondents' counsel "constitute" an act of state. As petitioner agrees, counsel's in-court statements were "no more than statements of a litigating position" (Petitioner's Br., p. 5). There may be situations in which statements of counsel may constitute an act of state, but no such contention is made here.[8]

8. It follows that petitioner's reliance (Br. p. 12) on *Compania Espanola de Navegicon Maritima* v. *The Navemar*, 303 U.S. 68 (1938), is misplaced. The issue in that case was not whether the Court would accept the statement of the Ambassador of Spain as a statement of the government, but whether the statement of the government as transmitted to the Court by the ambassador was in fact

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Under our law a statement by counsel is deemed to have been authorized by his client. *Laird* v. *Air France Engine Service, Inc.*, 262 F. 2d 948 (5th Cir. 1959; *Vaccaro* v. *Alcoa S.S. Co.*, 405 F. 2d 1133 (2nd Cir. 1968). We have here counsel's advice to the Court that his client, the Republic of Cuba, is relying on the act of state doctrine as a defense to the claim of petitioner. Therefore, the proper question before this Court is whether the act of state defense is available on the facts of this case.

Petitioner argues that there was no "act" by the Republic of Cuba which could have constituted an act of state. But on the record here there is ample showing of an act of state by Cuba. The interventor, an agent of the state, accepted and retained the petitioner's payments for pre-intervention shipments.[9] Moreover, such money was accepted on a claim of right, namely that the decree of September 15, 1960 nationalized accounts receivable. Furthermore, the interventor has refused to repay the monies accepted by it, and still claims that he is entitled to that

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supported by the record. The Court found that it was not. The statement of an ambassador, like the statement of a lawyer, is not proof of anything. It is merely an assertion made by the representative of a sovereign as to the position taken by that sovereign in litigation.

9. Petitioner (Br., p. 3) persists in stating that "interventors' principal line of defense . . . was to dispute that they had ever received the money," although the two lower court opinions to which petitioner refers say no such thing. When the belated claim of the former owners for pre-intervention shipments was discovered in 1967, the interventors admitted receiving a portion of the payments. As to the balance, the relevant records had been destroyed, and so the interventors could neither affirm nor deny such receipt. The District Court found that the interventors had been paid the full amount and the Court of Appeals affirmed. That issue is therefore no longer in this case.

money by virtue of the nationalization decree.[10] It matters not that the interventor may be wrong in the eyes of the United States court. The act of state doctrine does not stand or fall on whether the sovereign is right under United States law.[11] Since the monies taken by the interventor were in Cuba, and he was a representative of the sovereign, it can hardly be denied that his conduct amounted to "a taking of property within its own territory by a foreign sovereign government." *Sabbatino* at p. 428.

It is agreed by all that an act of state need not be evidenced by any particular formality, and this Court, and others, have frequently found an act of state on much less than the conduct of Cuba in this case. So, in *Underhill* v. *Hernandez*, 168 U.S. 250,[12] the "act" of the state consisted of the detention of the plaintiff, and an assault on him committed by some soldiers of a revolutionary army in the field. Likewise, in *Oetjen* v. *Central Leather Co.* 246 U.S. 297, and *Ricaud* v. *American Metal Co.*, 246 U.S. 304, the act of state was the physical seizure of property by soldiers in the field. See also *American Banana Co.* v. *United Fruit*, 213 U.S. 347.

We cannot see how the interventor's receipt of funds and his refusal to repay them under a claim that they were included in the nationalization decree is any the less an act of Cuba than General Villa's seizure of hides and their retention in the *Oetjen case* was an act of Mexico.

In *French* v. *Banco Nacional*, 23 N.Y. 2d 46 (1968), the Cuban government refused to pay certain obligations evidenced by certificates of indebtedness issued by Banco

10. See Petition for Certiorari filed by the interventor, No. 73-1287, pp. 4, 12-14.

11. As the Court of Appeals pointed out, "repudiation [of a debt] does not appear ever to have been recognized as a violation of international law." 485 F. 2d at 1370.

12. "The classic American statement of the act of state doctrine." *Banco Nacional* v. *Sabbatino, supra.*

Nacional. It argued that sovereign immunity applied; that the certificates of indebtedness did not really constitute a promise to pay; that a decree of the Currency Stabilization Fund had excused payment, and that the act of state doctrine banned judicial review of Cuba's repudiation of its debt. The Court of Appeals of New York found no sovereign immunity; it also found that the certificates in question were in fact promises to pay. There was some disagreement as to whether the decree of the Currency Stabilization Fund was valid and even as to whether it was applicable, but the majority of the Court of Appeals held that even if there had been no decree, Cuba's repudiation constituted an act of state. "[T]he act of state was the defendant's refusal to perform, . . ." 23 N.Y. 2d at 66.

The Court of Appeals for the Second Circuit has likewise held that an act of state need not be a formal act of the government, but may consist of a course of conduct. In *Bernstein* v. *van Heyghen Freres, S.A.*, 163 F. 2d 246 (2nd Cir. 1947), *cert. den.*, 332 U.S. 772, no formal government act was alleged. Plaintiff claimed that unidentified "Nazi officials" had forced him to give up control of a corporation he owned. The Court held that there was an act of state. *Accord, United States ex rel. Heymann* v. *Watkins*, 159 F. 2d 650 (2nd Cir. 1947); *Union Shipping and Trading Co.* v. *United States*, 127 F. 2d 771 (2nd Cir. 1942); *Hewitt* v. *Speyer*, 250 F. 367 (2nd Cir. 1918). See also *Occidental Petroleum Corp.* v. *Buttes Gas and Oil Co.*, 331 F. Supp. 92 (C.D. Calif. 1971), *aff'd*, 461 F. 2d 1261 (9th Cir. 1972) *cert. den.* 409 U.S. 950; *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474 (1938).

The petitioner has confused the issue before this Court by extended reference to the doctrine of sovereign immunity (Br. pp. 17, 20). The doctrines of act of state and sovereign immunity are related and sometimes overlap, but they are not the same thing. There are many cases in

which sovereign immunity is a defense and act of state is not. For example, *Spacil* v. *Crowe*, 489 F. 2d 614 (5th Cir. 1974). There are other cases in which the converse is true. *French* v. *Banco Nacional, supra; Oetjen* v. *Central Leather Co., supra; Bernstein* v. *van Heyghen Freres, S.A., supra.* And, there are undoubtedly some situations in which both defenses are available.

But the principles behind the two doctrines are quite different. The act of state doctrine teaches that the courts of the United States will not inquire into the acts of a sovereign done within its territory. The doctrine of sovereign immunity teaches that a sovereign and its property may be immune from suit or attachment in some circumstances. As Mr. Justice Brennan points out in his dissent in *Citibank*, the application of the act of state doctrine relieves the Judicial Branch of the necessity of assessing claims under international law under circumstances which may interfere with the foreign relations of the United States. No such virtue attends the application of the doctrine of sovereign immunity. 406 U.S. at 789, fn. 13.

It follows that petitioner's argument, that the Court of Appeals "in effect granted Cuba the sovereign immunity it could not otherwise effectively plead" (Pet. Br., p. 19) is not well taken. Every case in which the sovereign successfully relies on an act of state (as in *Sabbatino*) results in a decision in favor of the sovereign. In many such cases, the defense of sovereign immunity would not be available to the sovereign as it may not have been available here.[13]

13. Just for the record, a word or two concerning the so-called restrictive doctrine of sovereign immunity may be appropriate. That doctrine derives from the Tate letter, 26 Dept. of State Bulletin 984 (1952), and has never been reviewed by this Court. Further, it has been disregarded both by the courts and the State Department itself in two recent cases, both involving Cuba; *Spacil* v. *Crowe, supra,* and

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But that fact in no way derogates from the applicability of the act of state defense.

Petitioner at pp. 14-19 of its brief seeks to break down the rationale of the *Sabbatino* decision into "five factors" and then proceeds to argue that none of these "factors" are applicable here. We suggest that such analysis is misleading and mistakes the thrust of the *Sabbatino* case.

Basic to the act of state doctrine is the principle that relations between states which affect both legal and political issues ought to be left to the Executive Branch of the government and that judicial review of the acts of a foreign state should not be undertaken in those kinds of cases in which the issues touch "sharply on national nerves" (*Sabbatino* at 428). There is a danger, said this Court, that in such cases there may be an affront to the foreign government and an interference with the ability of the executive to dispose of differences which may exist between the United States and the foreign government. One of the elements the Court looked to is the extent of codification or at least consensus concerning the particular area involved, as evidenced by treaties or uniform international practice.

The Court found in *Sabbatino* (at 430) and it is equally true here, that "it is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals" of the members of the family of nations. And petitioner does not challenge the conclusion reached by the Court in *Sabbatino*

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Rich v. *Naviera Vacuba*, 197 F. Supp. 710 (E.D. Va. 1961), *aff'd* 295 F. 2d 24 (4th Cir. 1961). Certainly the pending bills, S.566 and H.R. 3493, 93rd Cong., 1st Sess., on which petitioner seems to place some reliance (Br., pp. 18-20) have nothing to do with this case. They relate to sovereign immunity, not to act of state, and they have not been enacted into law.

(at p. 428-430) that there is no consensus among the nations of the world as to the respective rights of the nationalizing country and the foreign property owners.[14]

One additional point is made in the *Sabbatino* case which is of substantial significance in this case. In *Sabbatino* this Court warned against the problems arising from "piecemeal disposition" of controversies between nations. In the present proceeding, petitioner is urging this Court not only to indulge in a piecemeal disposition of the claims of American creditors against Cuba, and cross-claims which Cuba may have against the United States or its nationals, but it is even urging the Court to engage in a piecemeal disposition of this very litigation by isolating one issue out of many. There is no doubt that a resolution of the differences between the United States and Cuba will some day be resolved by negotiation and, of course, such negotiation must be carried on by the Executive Branch. To attempt a piecemeal disposition of claims at this date is illustrative of the wisdom of the *Sabbatino* decision and the desirability of applying the act of state doctrine to this controversy.

POINT III

There is no justification for a "counterclaim exception" to the Act of State Doctrine; if an exception of any kind is appropriate, it ought not to encompass the facts of this case.

As we point out above (p. 14) this Court has never approved a "counterclaim exception" to the act of state

14. For reasons which are not clear to us, petitioner, in discussing the question of the codification of international law, makes reference, at page 18 of its brief, to bills pending in Congress on the subject of sovereign immunity. As we note above at p. 20, sovereign immunity is quite different from act of state, and, in any event, the proposed bills represent a proposed codification of United States law and not international law.

doctrine. The most that can be said is that in the *Citibank* case, *supra*, one Justice (Mr. Justice Douglas) approved such a counterclaim exception in broad terms at 406 U.S. 771); and that three other justices (Chief Justice Burger and Justices White and Rehnquist) approved an exception only when there was a "Bernstein/Stevenson" letter affirming the view of the State Department that its policy did not require the application of the act of state doctrine (at 406 U.S. at 764). The other five justices of the Court specifically disapproved a counterclaim exception to the *Sabbatino rule* (406 U.S. at 773, 793).

A. The *Citibank* Opinion of Mr. Justice Douglas.

With all due respect, we submit that the concurring opinion of Mr. Justice Douglas was in error; it ought not to be endorsed by the Court and should be reexamined by Mr. Justice Douglas himself. Acceptance of a counterclaim exception to the act of state doctrine is possible only if one is basically in disagreement with the *Sabbatino* decision. Every argument used by the Court in the *Sabbatino* case—the proper division of functions between the Judicial and Executive Branches; the possibility of embarrassment to the Executive Branch; the danger of touching upon the most "sensitive nerves" of a foreign power; the absence of codification or a consensus among the nations of the world as to the proper law on this subject;—all of these arguments have equal force whether a court is considering an original claim or a counterclaim.

There is only one possible argument in support of Mr. Justice Douglas' opinion and that is one based upon "fairness." But *every* application of the act of state doctrine, just like every application of the doctrine of sovereign immunity and, indeed, every judicial enforcement of cur-

rency control regulations is "unfair."[15] The question before the Court is not whether a result is fair or unfair to the litigants, but whether it is required by overriding considerations affecting the welfare of the United States. The *Sabbatino* decision gives the answer to that and we submit again with the greatest respect that the opinion of Mr. Justice Douglas in *Citibank* ignores it.

B. The Opinion of Mr. Justice Rehnquist

The opinion of Mr. Justice Rehnquist in the *Citibank* case likewise gives no support to the petitioner. We argued in that case and urge once again here that a "Bernstein letter" ought not to be considered by this Court in passing upon an act of state case and six of the nine justices on this bench agreed with us. *Cf. Dreyfus* v. *Von Finch*, — F. Supp. — (S.D.N.Y. May 20, 1974, No. 73 Civ. 5271). But quite aside from that, the Rehnquist opinion is not applicable here. We have no Bernstein letter and the letter submitted by the State Department in the *Citibank* case is in no way applicable to this case for three reasons:

(1) Mr. Stevenson's letter, even in its own terms, does not apply to this case because the State Department (like Mr. Justice Douglas) made it clear that any counterclaim exception to the act of state doctrine should *not* apply to an affirmative judgment against a foreign power.

15. Mr. Justice Douglas stated at p. 772 that "To allow recovery without more would permit Cuba to have its cake and eat it too." But Cuba will have no cake in this situation, as any recovery it gains will be frozen and will not be paid over except by an order of Congress or the Executive Branch. See *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106 (2nd Cir. 1966), *cert. den.*, 385 U.S. 898, in which this Court refused to review a decision of the Second Circuit Court of Appeals which was grossly and admittedly unfair to an aged Cuban worker because there were national policy considerations which outweighed any private interest plaintiff may have had.

(2) The letter in the *Citibank* case was written in 1970 and was based on the requirements of the "foreign policy interests of the United States." Obviously the foreign policy interests of the United States vary from time to time and by the time this case is heard more than four years will have passed since Mr. Stevenson wrote his letter to this Court. Those are four momentous years in the history of our country and in the development of its foreign policy, and there is no reason for believing that the foreign policy interests of the United States are the same now as they were at that time, especially in view of the silence from the State Department.

(3) The State Department letter in the *Citibank* case expressed policy of the Department "in this or like cases." 442 F. 2d at 538. The *Citibank* case involved the nationalization of Citibank's property in Havana. This case involves an action for unjust enrichment arising out of a commercial transaction. There is no reason to believe that Mr. Stevenson's letter in the *Citibank* case intended to encompass cases as unlike as these two litigations.

The petitioner, acting upon the suggestion inherent in the second question framed by this Court in granting the petition, has urged that the three cases which were tried together should be considered as a single case and that the aggregate judgment in favor of respondent in the two other cases be used as the standard against which the judgment of petitioner shall be measured in determining whether there is here an affirmative judgment in favor of petitioner. There are several reasons why this cannot be done:

First, as we note above, *supra*, p. 13, there are no "co-defendants" in this litigation. Four actions against petitioner were filed in the district court in 1961; in 1966, those four actions were consolidated into a single action against petitioner, and respondents were allowed to intervene as a

parties-plaintiff. Since there happened to be at the moment two other cases pending in the district court raising similar issues the three cases were tried together. Separate counsel represented each of the defendants; separate testimony was offered, and separate judgments were entered.

Second, in the extensive litigation in the Southern District of New York involving actions by and against Cuba there has been a considerable overlap of legal issues. The litigation by Cuba against First National City Bank and Chase Manhattan Bank involved issues which were in many respects identical. The cases involving sugar shipments raised another class of issues. Cases against tobacco importers raised still other kinds of issues. There are still pending and untried in the Southern District of New York still other litigation involving banks which raises still other issues. Most, if not all of the cases, raised one or another aspect of the act of state doctrine.

In the tobacco litigation of which petitioner's claim is part, the joint trial of three cases was found convenient because the same counsel represented all of the former owners, the same counsel represented the interventor in all three cases, and the three lawyers representing the importers were prepared to work together in a consolidated trial. But these three cases are not the only tobacco cases then pending in the Southern District and it is coincidence that these three cases happened to get tried together while the others were left out.[16]

In the cases against First National City Bank and Chase, the issues are likewise similar. Had history developed a bit differently those cases likewise could have been tried together and perhaps that would have been a

16. See *Tabacalera Cubana* v. *Chadbourne*, 61 Civ. 2301; *Tabacalera Cubana* v. *Faber, Coe & Gregg*, 66 Civ. 3477; *Romeo y Julietta* v. *Faber, Coe & Gregg*, 61 Civ. 1749; *Piedra* v. *Wood*, 61 Civ. 1177.

quicker and more convenient way of handling the legal and factual issues which had to be decided by the court. They were not consolidated for trial and, indeed, the Chase case has only just been tried in the district court while the First National City Bank case has already been decided in this Court.

Whether particular cases are tried together has nothing to do with the respective rights of the parties; such consolidation is merely a convenient tool for the economical use of the court's time. Petitioner's argument would lead to the result that First National City Bank could have secured an affirmative judgment against Banco Nacional in the *Citibank* case and enforced it against a judgment which Banco Nacional may get against Chase Manhattan. It is equally improper to urge that, under the so-called counterclaim exception recognized by a minority of this Court in the *Citibank* case, petitioner may get an affirmative judgment against Cuba because, for the convenience of everyone involved, the case happened to be tried together with two other cases.

Third, there is an interest involved here which has not been taken into consideration either by the petitioner or by the court in framing its question, and that is the interest of the other two branches of government. Congress and the Executive branch in concert have set up an elaborate program for the registration of claims against Cuba and the freezing of Cuban assets in the United States, presumably with the view of a possible ultimate settlement, similar to the settlement reached with other countries, which will utilize the frozen funds to pay off a portion of the claims. Supra, p. 8. We believe that in the *Citibank* case this Court did a disservice to that program and that the dissenting opinion of Mr. Justice Brennan, 406 U.S. at 794, was quite right in urging that failure to apply the act of

state doctrine resulted in a preference for a favored creditor. See also the Court of Appeals decision in *Citibank*, 442 F. 2d at 535.

The position taken by petitioner here thus offends national policy. Petitioner, a potential judgment-creditor against Cuba, evidently expects to be able to collect its claim by executing against a judgment in favor of Cuba against Faber, Coe & Gregg. First National Bank of Boston has submitted an amicus brief in this case; it evidently expects to collect a possible judgment in its favor by executing against a judgment Cuba may recover against Chase Bank, and has sought to attach Cuba's claim. If this leak in the dike is permitted it will not require much of a flood to wipe out all of the Cuban assets in the United States in a very short time, thus frustrating totally the policy of the Executive branch and of Congress.

If, on the other hand, the policy of the Executive and Legislative branches is to be maintained, everything that we are doing in connection with this pending petition is a total waste of time since the affirmative judgment for which petitioner is struggling so hard would have nothing against which it may execute.

CONCLUSION

The petition herein was improvidently granted and the Writ of Certiorari should be dismissed. Alternatively, the judgment of the Court of Appeals should be affirmed.

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New York, New York 10017

DORIAN BOWMAN
Of Counsel

August 29, 1974

Appendix A

Title 31, Code of Federal Regulations, Part 515, entitled "Cuban Assets Control Regulations," in relevant part provide as follows:

§ 515.101 Relation of this part to other laws and regulations.

The Cuban Import Regulations issued on February 6, 1962, as amended, are hereby revoked and the following Regulations are hereby adopted in place thereof controlling all financial and commercial transactions involving Cuba or nationals thereof, provided that the revocation of the Cuban Import Regulations shall not be deemed to authorize any unlicensed importation prohibited by the Cuban Import Regulations and all penalties, forfeitures, and liabilities under such Regulations or any other applicable laws or regulations shall continue and may be enforced as if such revocation had not been made.

* * *

§ 515.201 Transactions involving designated foreign countries or their nationals; effective date.

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated under this part, or any national thereof, or such transactions involve property in which a foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatesoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set

forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term "foreign country designated under this part" and the term "designated foreign country" mean Cuba and the term "effective date" and the term "effective date of this section" mean with respect to Cuba, or any national thereof, 12:01 A.M., E.S.T., July 8, 1963.

• • •

§ 515.310 Transfer.

The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power.

Appendix A

§ 515.311 Property; property interests.

Except as defined in § 515.203(f) for the purposes of that section the terms "property" and "property interest" or "property interests" shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness obligations, notes, debentures, stocks, bonds, coupons, any other financial securities, bankers' acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

Appendix B

July 1, 1974

Mr. Stanley Sommerfield
Office of Foreign Assets Control
Treasury Department
Washington, D.C.

Re: Frozen Cuban Assets

Dear Mr. Sommerfield:

It has always been my understanding that the Office of Foreign Assets Control, as a matter of policy, would not permit a creditor of Cuba to collect a judgment by executing on frozen assets belonging to Cuba, whether those funds were in the bank accounts that we have maintained in the name of "Rabinowitz & Boudin Special for the Account of the Republic of Cuba and its Agencies" or they were in the possession of some debtor of Cuba. Such a license would obviously constitute a preference for the judgment-creditor and that, I would assume, would require a policy decision which has not yet been made either by Congress or by the Treasury Department.

The question has arisen several times in the past and most recently in connection with a claim by Dunhill & Co. against the Republic of Cuba. Dunhill had assumed that if it secured a judgment against Cuba, it could execute that judgment against money owing to Cuba from other creditors and it had in fact attempted to attach funds owing to Cuba by Faber, Coe & Gregg, another cigar importer whose claim is likewise in litigation. I advised counsel for Dunhill that I doubted that you would license execution on any judgment that Dunhill might obtain, but indicated that if you did approve, I would submit a settlement proposal to my clients. I later heard that counsel for Dunhill

Appendix B

had spoken to you and that you indicated that you would not approve such an execution; further, I now learn that my clients will not agree either.

It would be helpful if you would confirm my understanding that, generally speaking, you will not issue a license to permit a judgment-creditor of Cuba to execute against assets of Cuba which have been frozen pursuant to the Foreign Assets Control regulations. Such a confirmation by you of this policy will be helpful to me in dealing with both potential creditors of Cuba and the courts.

Sincerely yours,

VICTOR RABINOWITZ

VR:mc

THE DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

FOREIGN ASSETS CONTROL
IN REPLY REFER TO: FAC No. 77768

Aug. 1, 1974

Mr. Victor Rabinowitz
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017
Dear Mr. Rabinowitz:

Reference is made to your letter of July 1, 1974 with respect to licensing execution on blocked Cuban assets.

This will confirm your understanding that in general it is not in accord with licensing policy under the Cuban

Appendix B

Assets Control Regulations to authorize a judgment-creditor of Cuba to execute against assets of Cuba which have been frozen pursuant to the Cuban Assets Control regulations.

Very truly yours,

STANLEY L. SOMMERFIELD
Acting Director
Office of Foreign Assets Control

Supreme Court, U. S.
FILED
AUG 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1288

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Petitioner,

v.

THE REPUBLIC OF CUBA and
DANIEL SOLANO PINERA, as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF BANK OF BOSTON INTERNATIONAL AS *AMICUS CURIAE*

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BRIEF OF BANK OF BOSTON INTERNATIONAL AS *AMICUS CURIAE*

By consent of the petitioner and the respondents indorsed hereon in accordance with Rule 42(2) of this Court, the Bank of Boston International files this brief as *amicus curiae*, urging reversal of the judgment below.

Interest of the *Amicus Curiae*

The *amicus curiae*, Bank of Boston International (hereafter "BBI"), has an interest in this case in that it is the plaintiff in *Bank of Boston International* v. *Banco Nacional de Cuba*, 61 Civ. 2116, an action pending before the United States District Court for the Southern District

of New York, in which is involved, *inter alia*, a substantially similar question to that presented for decision in the instant case, that is, whether statements by counsel* that an obligation will not be honored constitute an act of state. The question is presented in even more extreme terms than in *Dunhill*, since in the *Bank of Boston* case the statements of counsel which were made are in direct conflict with the legislation and administrative resolutions of the Republic of Cuba which expressly assumed the contractual obligation upon which the claim of BBI is based.

Bank of Boston International v. *Banco Nacional de Cuba*

BBI commenced its action in the Supreme Court of the State of New York, County of New York, in April 1961. Defendant, Banco Nacional de Cuba, removed the action to the United States District Court for the Southern District of New York. Jurisdiction over the defendant was acquired by levy pursuant to an order of attachment upon all its property located in New York County. The attachment has remained in effect at all times since April 1961. A trial was held in the Southern District of New York before the Honorable Frederick V. P. Bryan from June 12 to June 14, 1972 and on July 17, 1972. The case is still *sub judice*, presumably, awaiting a final determination of the instant petition.

The claim for relief asserted by BBI arose out of a loss to BBI's assignor, The First National Bank of Boston (the "Boston Bank"), resulting from commercial transactions

* The same counsel that made the statement in *Dunhill*.

in the form of 324 letters of credit issued by the several Cuban branches of the Boston Bank (collectively the "Cuban Branch"), prior to their expropriation by the Cuban government, for the account of Cuban importers and in favor of exporters to Cuba located primarily in the United States. The letters of credit provided that drafts drawn under them were payable to such exporters at the office of the Boston Bank in Boston, or at the office of BBI in New York. Upon expropriation, Banco Nacional de Cuba assumed control of the Cuban Branch. Thereafter, pursuant to such letters of credit, the Boston Bank paid out $1,675,748.71 to finance (also after the expropriation) the importation of essential merchandise into Cuba.

It is BBI's contention that under cases such as *Pan-American Bank and Trust Co.* v. *National City Bank of New York*, 6 F.2d 762 (2d Cir.), *cert. denied*, 269 U.S. 554 (1925), the Cuban Branch owed a legally recognizable obligation to reimburse its head office for payments made under these letters of credit and that this obligation was assumed by Banco Nacional under the expropriation decrees which transferred to Banco Nacional all liabilities, as well as $8,000,000 in assets, of the Cuban Branch. In addition, BBI seeks to recover the amount paid upon these letters of credit upon a contractual obligation expressly undertaken by Banco Nacional prior to expropriation of the Cuban Branch of the Boston Bank (and relied upon by the Boston Bank) to make dollars available to the Boston Bank in an amount equal to payments made under the 324 letters of credit.

BBI's claim did not challenge or disregard any act of the Republic of Cuba. Rather it brought an action that sought

to affirm acts of the Cuban state.* In its first claim, BBI relied on Law No. 930 of the Republic of Cuba which provided that Banco Nacional, as the legal successor to the Cuban Branch, had assumed all the obligations of the Cuban Branch peculiar to its banking operations. Cuban Law No. 930, Special Provision Fifth (1961). In its second claim BBI showed that prior to nationalization (a) Banco Nacional approved every one of the letter of credit transactions; (b) the head of the exchange control department of Banco Nacional expressly represented to officers of the Cuban Branch that such approvals were a commitment to reimburse the Boston Bank for payments made under letters of credit; and (c) payment of dollars by Banco Nacional was required pursuant to the relevant Cuban foreign exchange statutes (Cuban Law No. 13 Article 81 (1948); Cuban Law No. 891 (1960)).

In response to BBI's showing of various statutes, regulations, judicial decisions and other governmental acts of the Republic of Cuba, defendant Banco Nacional offered no evidence of any contrary "act" of the Cuban state other than the passive failure to reimburse the Boston Bank and the assertions of defendant's attorneys made for the first time on the eve of trial eleven years after the case was brought. Defendant conceded that its assertion that the mere failure to pay constitutes an act of state was the same argument it raised in the *Dunhill* case.

---

* The expropriation decrees were the same decrees involved in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972).

ARGUMENT

I.

Statements by Trial Counsel Cannot Constitute an Act of State.

An attorney's statement in court that an act of state exists does no more than *raise* the issue, as a pleading or argument. It cannot serve as *proof* that an act of state has taken place. If this Court rules that in court statements by an attorney can constitute an act of state, no United States court could ever render a judgment in a contract action against a foreign sovereign since an attorney could simply immunize his client from liability by coming into court and asserting that his client will not pay, regardless of the reason. Indeed, under the reasoning of the Court of Appeals in the instant case, the filing of an answer denying liability would totally insulate any such defendant from any liability whatsoever.

The lengths to which this dangerous precedent will be carried, if allowed to stand, is graphically demonstrated by *Bank of Boston International* v. *Banco Nacional de Cuba*. In that case, plaintiff's claim as to the liability of Banco Nacional de Cuba is *predicated* on official statutes and resolutions of the Cuban government which have never been repealed and are still in full force and effect. To consider the eleventh-year assertions of counsel as an act of state is dubious under any circumstances, but to allow such statements to overrule and countermand official acts of state is absurd. Yet that is precisely the contention being made by Banco Nacional on the strength of the Court of Appeals' decision in *Dunhill*.

II.

If the Decision Below Is Allowed to Stand the Repudiation of Contractual Obligations Will Be Rewarded and International Trade Will Be Seriously Curtailed.

It is common knowledge that the recent years have witnessed a marked increase in international trade and commerce; and that as foreign governments have become increasingly involved in commercial activities this foreign commerce has increasingly consisted of transactions by United States businesses or the United States Government with foreign governments acting in a commercial capacity. INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT, p. 37 (1974). This trade is of great importance to the United States economy. If it is to continue to prosper, it is essential that there be assurance that contractual obligations voluntarily undertaken by foreign governments and quasi-governmental bodies such as Banco Nacional will not lightly be nullified. While banks and others realize that there is such a doctrine as the Act of State, and that there are certain situations in which contracts can be abrogated by governmental acts, the risk from such acts should be clearly limited to those situations in which the governmental act is clearly evident. Rather than acquiesce in wholesale affronts to international law, this Court should establish a clear burden of proof for any foreign governmental agency claiming a windfall excuse from liability. Any holding of this Court which will allow a foreign government to escape responsibility for its commercial contractual obligations merely by having an attorney come into court and say that the government has decided not to pay would create the

potential of foreign governments and quasi-governmental bodies repudiating any time they choose contractual obligations solemnly assumed. Obviously, in addition to conferring on these foreign entities this potential of self-executing windfalls, any such holding would constitute a serious deterrent to the continued vitality of this form of commerce.

This Court has recognized in the area of sovereign immunity that governments may not categorically immunize themselves from claims arising out of commercial transactions. *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955). Yet if counsel for a government entity can merely state that his party will not pay and thereby avoid liability, sovereign immunity will have been reestablished on a different but far broader foundation. A holding which permits firm contractual obligations to be abrogated by after-the-fact denials by trial counsel will constitute a significant deterrent to the continued making of such commitments.

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Consents to Filing

Pursuant to Rule 42(2) of this Court we hereby consent to the filing by the Bank of Boston International of this brief as *amicus curiae.*

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Supreme Court, U. S.
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IN THE

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October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

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as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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August 15, 1975

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COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

This Supplemental Brief is submitted in response to an order of this Court entered on June 16, 1975, restoring the case to the calendar for reargument and directing the parties to brief the question of whether this Court's holding in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964) should be reconsidered.

Statement of Facts

A summary of the case appears in greater detail at pages 2-5 of Petitioner's Main Brief. For the purposes of the question briefed herein, certain salient facts will be recounted.

This litigation had its genesis in September, 1960, when the Republic of Cuba nationalized or "intervened" several Cuban manufacturers of cigars. For long prior to the intervention Dunhill and other importers had purchased cigars from those manufacturers, and for some months thereafter, the importers continued those purchases. Also during that immediate post-intervention period, the importers continued to pay for cigars which had been shipped prior to the intervention, but only to a minimal extent for post-intervention shipments. The owners fled Cuba, some coming to the United States.

In early 1961 the owners instituted nine actions in the Southern District of New York, including four against Dunhill. By these actions, the owners sought to obtain payment for all cigars which the importers had received, both before and after intervention, as well as to assert certain trademark claims. Shortly thereafter, the interventors sued the owners' counsel, seeking the right to prosecute those same claims. Since the importers were essentially in the position of stakeholders, the District Court stayed the actions against them and proceeded to resolve the fundamental disputes between the owners and the interventors.

Insofar as relevant here, the District Court, in a decision affirmed per curiam by the Second Circuit, held that the interventors were entitled to sue for the post-intervention shipments. *Palicio* v. *Brush & Bloch,* 256 F.Supp. 481 (S.D.N.Y. 1966), *aff'd per curiam,* 375 F.2d 1011 (2d Cir.), *cert. denied,* 389 U.S. 830 (1967). The Court held that, as to Cuban assets, the nationalization decree of 1960 could not be challenged in our courts under the act of state rationale of *Sabbatino.* At this time, the interventors stipulated that the owners were entiled to recover

for pre-intervention shipments, the assumption by both the owners and interventors being that those amounts were insignificant. J.App. 43a.

After the rulings in *Palicio,* the interventors were allowed to intervene, in the procedural sense, as plaintiffs in the nine actions against the importers. These actions were all consolidated for trial and were tried together in 1969.

During the course of trial preparation and at the trial itself, it developed that as of the date of intervention there was unpaid some $477,000 for pre-intervention shipments, hardly the insignificant sum assumed by the parties in *Palicio.* It further developed that the importers had paid those sums after intervention in accordance with their usual practice. Critically, it also developed that, although the interventors refused to admit receiving those funds, they, in fact, had received them. J.App., 20a-22a and 46a. In the case of Dunhill those payments amounted to some $148,000, or about $55,000 in excess of what Dunhill still owed Cuba for the post-intervention shipments. In the case of the importers as a group, however, far more was owed to the interventors for the post-intervention shipments (approximately $200,000) than had been paid to the interventors for the pre-intervention shipments. J.App. 44a-45a.

Judge Bryan ruled that the owners were entitled to payment for the pre-intervention shipments. He also ruled that the interventors wrongfully had received those payments and were liable, under an unjust enrichment theory, for their return to the importers. In his initial decision, he allowed each of the importers to set off the amount of those payments against the amounts due for the post-intervention shipments. He specifically ruled the act of

state doctrine inapplicable to the payments received by Cuba, stating, in part:

> "Here, all that occurred was a statement by counsel for the interventors, during trial, that the Cuban government and the interventors denied liability and had refused to make repayment. This statement was made after the interventors had invoked the jurisdiction of this Ccurt in order to pursue their claims against the importers for post-intervention shipments. It is hard to conceive how, if such a statement can be elevated to the status of an act of state, *any* refusal by *any* state to honor *any* obligation at *any* time could be considered anything else." J.App. 55a (emphasis in original).

It was apparent, of course, that the "set-off" procedure described by Judge Bryan in his initial opinion did not take account of Dunhill's situation. Accordingly, Dunhill moved for an affirmative judgment against the interventors. The interventors expressed no opposition and the motion was granted. J.App. 74a-75a. The effect of Judge Bryan's ruling was to require Dunhill to pay, with interest, for all of the cigars it had received. No money would flow to Dunhill, since any affirmative recovery against the interventors was owed to the owners.

The Second Circuit affirmed Judge Bryan's decision in all respects except one. It reversed the affirmative judgment in favor of Dunhill on the ground of the act of state doctrine. It found the act of state in Cuba's "failure to honor the importers' demand" for return of the payments ("confirmed by the Cuban government's counsel at trial"). J.App. 25a. The effect of the Court of Appeals ruling was to force Dunhill to pay twice for the same cigars —once to the owners and once to the interventors, both with interest.

Summary of Argument

The issues raised by this Court for reargument need only be decided if this Court holds that the remarks of counsel for the Republic of Cuba constituted competent evidence of an act of state unrelated to the original expropriation of the cigar factories. If the Court so holds, we submit that when a foreign sovereign repudiates its obligations arising from a course of commercial dealings, the policy considerations stated in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), do not support application of the act of state doctrine and compelling reasons exist for full adjudication of the controversy. This is particularly so when the act is in clear violation of international law as supported by a consensus of nations. Since the act of Cuba in this case arose out of its commercial dealings with Dunhill and constitutes a discriminatory taking without compensation, the act of state doctrine should not be applied in derogation of Dunhill's rights.

I.

Reconsideration of *Sabbatino* is unnecessary to the decision in this case unless this Court holds, contrary to the position of all parties, that the remarks of Cuba's counsel proved a separate and independent act of state.

For the reasons set forth at length in our principal brief, we submit that there is no support in the record for the existence of any act of state by the Republic of Cuba with respect to Dunhill. *See* Pet. Br. at 8-12. It remains Dunhill's position that remarks of counsel do not constitute an act of state, which must involve an affirmative act of a foreign sovereign within its territory, proved by competent evidence in our courts.

The Court of Appeals below held, without benefit of either briefs or argument on the subject, that the remarks of counsel "confirmed" a repudiation by Cuba of its ob-

ligation to return to Dunhill the money Dunhill paid Cuba by mistake. Briefing the subject for the first time, the interventors took the position in this Court that the original expropriation decree constituted the act of state upon which they rely. Expressly refusing to argue that counsel's remarks could prove an act of state (Resp. Br., at 12), they argued instead that the decree was the act of state which operated to seize any monies which subsequently were transferred to Cuba by the importers in satisfaction of accounts receivable.* Thus, Cuba states:

> "[O]n the record here there is ample showing of an act of state by Cuba. The interventor, an agent of the state, accepted and retained the petitioner's payments for pre-intervention shipments. Moreover, *such money was accepted on a claim of right, namely that the decree of September 15, 1960 nationalized accounts receivable.* Furthermore, the interventor has refused to repay the monies accepted by it, and still claims that he is entitled to that money *by virtue of the nationalization decree.*" Resp. Br. at 17-18 (footnotes omitted; emphasis added).

Thus both Dunhill and Cuba are in agreement that the Court below erred insofar as it held that counsel's remarks proved a separate and independent act of state. If this Court accepts either the position of Dunhill or that of Cuba, it need not reach the issue of whether *Sabbatino* should be reconsidered.

If this Court accepts Dunhill's position that the remarks of counsel do not prove a separate act of state, obviously

* The courts below held that the owners were entitled to the accounts receivable under the authority of *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), which held that an expropriation decree could not be given extraterritorial effect and denied the power of the Republic of Iraq to seize a United States bank account belonging to its former king. That case, following *Harris* v. *Balk*, 198 U.S. 215 (1905), also held that debts (such as accounts receivable) have a situs with the debtor.

such a holding will not involve a reconsideration of *Sabbatino*.

Similarly, if this Court accepts Cuba's position, it need not reexamine *Sabbatino*. If the Court should agree with Cuba that the 1960 decree was effective to nationalize the accounts receivable due the owners, Cuba will have been held to have taken assets belonging to the owners—former Cuban nationals.*

Such an expropriation would not be in violation of international law. As Mr. Justice White (dissenting in *Sabbatino*) stated: "violations of international law . . . were not presented [in cases where] the parties or predecessors in title were nationals of the acting state. . . ." 376 U.S. at 442. *See also* Restatement, Second, Foreign Relations Law of the United States, § 171(a) and Comment b to § 165;** *United States* v. *Belmont*, 301 U.S. 324, 332 (1937); Zander, *The Act of State Doctrine*, 53 AM.J.INT'L LAW 826, 833 (1959). Thus, since no violation of international law would be presented, reconsideration of *Sabbatino* would not affect the outcome of this case.

* Under this view, the holdings below would be radically changed and the respective rights of the owners and Cuba materially affected. If all accounts receivable are held to have been nationalized, the owners' claim against Dunhill and the other importers would be extinguished and Cuba would be entitled to judgment for those amounts. If, on the other hand, the 1960 decree is held effective only as to monies which found their way into Cuba, this would mean that the owners' judgments against the importers would be reduced and Cuba's judgments increased by such amounts.

** An exception may exist in the case of a crime against humanity committed by the sovereign and condemned by an international convention. *See* 376 U.S. at 457, n. 18. Comment b to § 165 of the Restatement declines to take a position on this question, stating: "It has recently been suggested that states are bound by international law to respect certain basic human rights of all persons, whether aliens or nationals. . . . The question whether international law imposes any obligations with respect to the treatment by a state of its own nationals is beyond the scope of the Restatement. . . ."

II.

The acts of the Republic of Cuba directed at Dunhill should not preclude the courts from fully adjudicating Dunhill's claims; insofar as *Sabbatino* holds otherwise, it should be reconsidered.

If the Court determines that the remarks of Cuba's counsel were sufficient proof of a separate and independent act of state, this Court must further determine whether that act precludes full adjudication of Dunhill's claims. We respectfully submit that *Sabbatino* does not preclude such adjudication; if it does, it should be reconsidered.

In *Sabbatino,* this Court stated that the "vitality" of the act of state doctrine "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches" of government. 376 U.S. at 427-28. The Court stressed that the proper distribution of those functions must be determined by weighing a "balance of relevant considerations." *Id.* at 428. Only after careful examination of those factors did the Court reach its decision that executive redress rather than adjudication was the proper means of resolving the controversy. We submit that in the case at bar the relevant considerations balance heavily in favor of adjudication and against application of the act of state doctrine.

In the absence of compelling policy considerations to the contrary, the Court should apply international law which "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Havana,* 175 U.S. 677, 700 (1900). Of course, we recognize that in declining to decide issues of international law in *Sabbatino,* the Court relied heavily on the sensitivities of

the executive branch in the area of foreign relations. Yet neither the executive nor the legislative branch has fully shared this concern. The Hickenlooper Amendment (22 U.S.C. § 2370(e)(2)) was enacted specifically to overturn *Sabbatino's* presumption of non-justiciability of violations of international law by foreign sovereigns. *1964 U.S. Code Cong. & Admin. News* 3890 (88th Cong., 2d Sess.). Moreover, the State Department, to our knowledge, has never proposed legislation to repeal the Hickenlooper Amendment. And in the only post-*Sabbatino* case in which the State Department has expressed its views, it argued against application of the act of state doctrine in that "or like cases." *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 764 (1972); *see also Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166, 172 n. 7 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968).

Although the Judiciary is not ordinarily bound by the concerns of the Executive and the Congress, the absence of such concern, we submit, is an important consideration in determining whether the courts should abstain, out of deference to the other branches, from their traditional role of adjudicating controversies between litigants. Where, as here, the act of the foreign sovereign arose out of its commercial dealings and is in clear violation of international law, there are no considerations which argue for the application of the act of state doctrine and compelling reasons for full adjudication of the controversy before the Court.

A. The act of state doctrine should not be available to a sovereign as a means of repudiating its commercial obligations.

Unlike the nationalized company in *Sabbatino,* Dunhill was not an investor of capital in Cuba. It was an importer, a purchaser of tobacco from Cuban businesses and later

from the Republic of Cuba. In consideration for its purchases, Dunhill, as required by commercial law, made payments for goods received. In the course of these transactions, some payments found their way to the wrong party—the Republic of Cuba. Rather than submit to an adjudication of the merits of Dunhill's claim for return of the money, Cuba invokes the act of state doctrine and, in its capacity as a sovereign, claims to have repudiated its debt to Dunhill.

If Cuba can take such a step with impunity in the course of ordinary commercial dealings, it is difficult to see, as Judge Bryan observed below (*see* p. 4 *supra*), why *any* refusal by *any* state to honor its obligations in the course of commercial transactions would not have to be treated as an act of state. The impact on international trade would be disastrous, and would run counter to the trend whereby sovereigns dealing in commercial transactions are increasingly treated as subject to the rule of law.

The trend in the field of sovereign immunity is to render a sovereign party to a commercial transaction amenable to suit in the United States and to enable litigants to execute against it. As noted in our principal brief (Pet. Br., at 18-20), this "restrictive theory" of sovereign immunity has been well-established since at least 1952, and proposals have been made to codify it into law. If Cuba can invoke the act of state doctrine in this case, any such limitation on sovereign immunity would be meaningless.

If the courts refuse to adjudicate Dunhill's claims on the ground that they cannot question Cuba's repudiation of its obligations, international trade between United States businesses and foreign governments would almost surely be adversely affected. The courts of the United States would effectively be closed as a means of redress for

any breach of an obligation committed by the foreign sovereign. Yet our courts would be open to the foreign sovereign to enforce the obligations of the United States businesses arising out of the same commercial transaction. Such one-sided enforcement of commercial obligations can hardly be expected to foster the increasingly important volume of trade being conducted between such businesses and foreign governments. *See* INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT, p. 56 (1975). The impact on international trade was a factor considered by the Court in *Sabbatino* as calling for application of the act of state doctrine. The impact on international trade when the sovereign is engaged in a commercial course of dealings calls for precisely the opposite result.

Nor can any nation engaged in international commercial dealings legitimately object to being held responsible for complying with generally recognized rules which govern all parties in international trade. The need for stability in international trade has prompted all countries, regardless of political orientation, to adopt uniform rules applicable to international transactions. Thus, Professor Jeraz Rajski of Poland explains:

> "The striking similarity evidenced in all national legal systems in this respect [international trade] explains itself through the essence of the subject-matter of their regulation: international commerce. The international character of the regulated subject-matter imposes a certain necessary degree of similarity in the given national legal solutions. The goal of these provisions is to safeguard international economic intercourse, which can be achieved by establishing a stable legal protection of the interests of those involved in foreign commercial transac-

> tions. Because in those cases a foreign element is always present, they can come under the laws and jurisdictions of different states. As a consequence of this, the existence of fundamental differences in the various municipal laws would constitute a danger of insecurity and uncertainty with regard to the extent of legal protection. This would result in making the law more an obstacle than an element of encouragement for the development of international economic intercourse." Rajski, *The Law of International Trade of Some European Socialist Countries and East-West Trade Relations,* 1967 WASH. U.L.Q. 125, 137.

Professor Rajski's views stem in part from an international conference held in 1962 in which "the most eminent experts on international trade law from both socialist and Western countries were represented." *Id.* at 129. Professor Schmitthoff of England, who delivered the general report at the conference, points out that the law which is emerging is not simply a specification by parties of a governing state law or a similar choice-of-law clause, but a bona fide international body of law:

> "One of the most remarkable developments on the contemporary legal scene is the emergence of an autonomous law of international trade which, by tolerance of the national sovereigns, is breaking through the barriers of national legal systems and assuming universal character. . . .
>
> "We are beginning to rediscover the international character of commercial law and the circle now completes itself: the general trend of commercial law everywhere is to move away from the restrictions of national law to a universal, international conception of the law of international trade." Schmitthof, *The Unification or Harmonization of Law by Means of Standard Contracts and General Conditions,* 17 INT'L AND COMP. L. Q. 551, 563-64 (1968) (footnotes omitted).

See also Lowenfeld, INTERNATIONAL PRIVATE TRADE, pp. 1-2 (Matthew Bender 1975); Gal, *The Commercial Law of Nations and the Law of International Trade,* 6 CORN. INT'L L. J. 55, 64 (1972); Trommer, *The Law of Foreign Trade in the Legal Systems of the Countries of Planned Economy,* in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 41 (Schmitthoff ed. 1964) (hereinafter "SCHMITTHOFF"); Knapp, *The Function, Organization and Activities of Foreign Trade Corporations in the European Socialist Countries,* SCHMITTHOFF 52; Goldstajn, *International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law,* SCHMITTHOFF 103; Ionasco, *The Limits of Party Autonomy,* SCHMITTHOFF 167; and Schmitthoff, *Introduction,* SCHMITTHOFF at ix.

It hardly serves the purpose of international commercial stability to hold that an act of state repudiating commercial obligations precludes adjudication, and that by the talismanic invocation of the act of state doctrine a sovereign dealing as a merchant can defeat the system of law constructed to govern all parties who engage in international commercial transactions. On the contrary, recognition by the courts of such arbitrary action by a sovereign would be antithetical to the goal of expanded world trade, a prime concern of this country:

> "There is wide international recognition that national economies have become so interrelated that arbitrary actions on either the import or export side can adversely affect the economic activity in other countries. Such actions can undermine the

foundation of the international trading system and put in jeopardy the benefits of expanded and freer world trade." INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT, pp. 29-30 (1975).

It is difficult, therefore, to see how our executive branch could be embarassed by application of rules governing international trade to foreign sovereigns acting in the commercial arena. The concern of *Sabbatino* with such embarassment in possibly sensitive areas of international law (376 U.S. at 433) simply does not apply to a sovereign operating in the market place as a private trader. Indeed, we perceive no reason why a sovereign acting as a party to a commercial transaction should fare differently in our courts under the act of state doctrine than under the doctrine of sovereign immunity.* In the highly unlikely event that the Executive expressed its view that adjudication of such a dispute would be injurious to the foreign policy interests of the United States, that view could be considered as a factor to be weighed by the courts in determining their role; but, absent such expression, the clear presumption in this context should be in favor of adjudication.

Finally, we note that although the equities of the parties have not been viewed as a critical factor in act of state

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* The rationale for the State Department's restrictive theory of sovereign immunity argues equally for the inapplicability of the act of state doctrine in commercial dealings:

> "[T]he Department feels that the widespread and increasing practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in courts." Letter from Jack B. Tate to Philip B. Perlman, May 19, 1952, 26 DEP'T STATE BULL. 984 (1952).

Clearly, where a foreign sovereign has breached its commercial obligations (*see, e.g.,* N.Y. Times, May 19, 1975, at 43, col. 5), the rights of the parties in United States courts should not depend on whether the sovereign pleads that it has repudiated its obligations as an act of state or whether it pleads that it has not consented to be sued.

cases, equitable considerations make wholly inappropriate application of the act of state doctrine in cases where the sovereign is a party to a commercial transaction. Because the sovereign's act is directed at a purchaser or seller of goods and not an investor, there is no question of claims by the sovereign for any alleged exploitation. Nor must the Court balance the rights of the original owners of expropriated property against those of innocent third party purchasers. *Compare Sabbatino, supra,* 376 U.S. at 435. In the case at bar, of course, the effect of applying the act of state doctrine is to ignore the legal and equitable principles which both courts below held squarely should govern the rights of the parties, giving Cuba a windfall and creating a double liability for Dunhill.

B. If an act of state is in violation of international law supported by a consensus of nations, the act of state doctrine should not be available to a sovereign as a means of repudiating its commercial obligations.

When a sovereign repudiates its obligations arising out of commercial dealings, the courts should adjudicate the claims of the parties to the transaction. *See* Point A *supra.* In the case at bar, there is an additional reason for the Court not to apply the act of state doctrine. Cuba's act, a discriminatory taking without compensation, was in violation of international law supported by a consensus of nations. The existence of such a consensus (even in a non-commercial context) lessens the possibility that the courts will embarass the executive branch. The courts, furthermore, can not be accused of rendering a biased decision when all agree upon the applicable law.

In Point A we demonstrated why a sovereign should not be permitted under the act of state doctrine to repudiate its obligations arising in the course of international trade. While we do not concede the point, we recognize

that sovereigns may claim that their acts, although affecting their commercial obligations, can be justified as having a higher public purpose. However, where such acts are in flagrant violation of international law, no justification exists for special treatment of the sovereign by virtue of that status. A sovereign engaged in international commerce should not be allowed to plead its sovereign status as justification for acts committed in violation of principles which are accepted as governing the behavior of nations.

In *Sabbatino,* the Court noted the importance of a consensus of international law in determining whether the act of state doctrine should apply. The Court reasoned that "the greater degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." 346 U.S. at 428. *See also id.* at 430, n. 34.

It is unclear from *Sabbatino* whether a finding that a consensus supports a particular aspect of international law would suffice to invalidate an act of state in violation thereof. It has been suggested that if the *Sabbatino* Court had found the act of Cuba to be in flagrant disregard of such a consensus, it would not have applied the act of state doctrine. *See* F. Mann, *The Legal Consequences of Sabbatino*, 51 Va. L. Rev. 604, 607-08 (1965). Under this analysis, *Sabbatino* would support a full adjudication on the merits in the case at bar, where there has been a discriminatory act of state without compensation, in clear violation of international law. *See infra*, pp. 17-18.

The other view of *Sabbatino* is that it held that the act of state doctrine should be applied even in the face of a clear violation of international law. *See Sabbatino,* 376 U.S. at 456 (White, J. dissenting). Even if *Sabbatino* so held, we believe the Court made clear that a violation of international law recognized by a consensus of nations is a factor weighing in favor of full adjudication. *See* p. 16, *supra.*

Thus, even the broader reading of *Sabbatino* is wholly consistent with our position that a flagrant violation of international law is a factor to be considered. For the reasons set forth in this Point and Point A, *supra,* we respectfully submit that in the context of a sovereign's commercial transactions, its clear violation of international law is sufficient reason to compel adjudication on the merits. If *Sabbatino* holds otherwise it should be reconsidered.

We need hardly belabor the point that Cuba's actions in respect of Dunhill constitute a clear violation of international law. This is not a case where conflicting ideological systems may reach different conclusions regarding the legitimate purpose of an expropriation or the adequacy or promptness of consideration paid for property seized. *See Sabbatino,* 376 U.S. at 428-30. Here, Cuba's actions, however characterized,* amount to nothing more than a discriminatory taking without any justification or compensation. Such a taking violates international law as recognized by the consensus of nations. R. Falk, *The Complexity*

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* Cuba's action was described by the Court of Appeals both as a repudiation of its obligations and as a failure to honor Dunhill's demand for the return of its money. J. App. 25a. We eschew the opportunity to argue that Cuba's actions did not constitute a "taking of property", the language used by the Court in *Sabbatino* in limiting its express holding. 376 U.S. at 428. The legality of theft, however termed, has never been advocated by any country. *See, e.g.,* F. Mann, *The Legal Consequences of Sabbatino,* 51 Va. L. Rev. 604, 613 (1965).

of Sabbatino, 58 Am. J. Int. L. 935, 944 (1964); F. Mann, *The Legal Consequences of Sabbatino,* 51 Va. L. Rev. 604, 613-614, 617 (1965); *Sabbatino, supra,* 376 U.S. at 465, n. 22 (White, J. dissenting); *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166, 183 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968).

CONCLUSION

Respondents' attempt to prevent the courts from fully adjudicating this case should be rejected, and the judgment of the Court of Appeals for the Second Circuit reversed to reinstate Petitioner's affirmative judgment.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

—against—

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA,
As Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS ON REARGUMENT

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October 1, 1975

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BRIEF FOR RESPONDENTS ON REARGUMENT

POINT I

There Is No International Law Issue In This Case; Hence This Court's Holding In *Banco Nacional* v. *Sabbatino* Is Not Relevant To This Proceeding.

We must keep in mind the issue before this Court in *Banco Nacional* v. *Sabbatino,* 376 U.S. 398, and what this Court held on that issue. The act of state doctrine (on which respondents rely herein) was not created by that decision. It dates, at least, from *Underhill* v. *Hernandez,* 168 U.S. 250, in 1897. Rather, this Court's holding in *Sabbatino* was prompted by the fact that the District Court, 193 F.Supp. 375 (S.D.N.Y. 1961) and the Court of Appeals,

307 F.2d 845 (2d Cir. 1962) had held that the doctrine was not applicable when the act of the foreign sovereign was a violation of international law.

This Court rejected that exception in cases involving the nationalization of alien property on grounds too familiar to require repetition at this point. We do not understand that the minority opinion of Mr. Justice White in his *Sabbatino* dissent, 376 U.S. at 459, the doubts suggested by Mr. Justice Powell in his concurring opinion in *First National City Bank* v. *Banco Nacional,* 406 U.S. 759, 773, and the questions raised by academic and other critics of the *Sabbatino* decision take issue with the act of state doctrine itself, but only with this Court's failure to make an exception in cases of violation of international law. Leigh, *The Supreme Court and The Sabbatino Watchers: First National City Bank* v. *Banco Nacional de Cuba,* 13 Va. J.Int'l.L. 33 (1972); Mann, *The Legal Consequences of Sabbatino,* 51 Va. L. Rev. 604 (1965); Stevenson, *The Sabbatino Case—Three Steps Forward and Two Steps Back,* 57 Am.J.Int'l.L. 97 (1963).

There is no violation of international law raised by the record; it follows that there is no occasion for reviewing the holding of *Sabbatino.*

On September 16, 1960 the Republic of Cuba directed the intervention[1] of the Cuban-owned tobacco companies. Up

[1] Throughout these proceedings, the words "intervention" and "nationalization" have been used interchangably. In Latin American law there is a considerable difference between them. Intervention is a device, utilized not only in Cuba but in most Latin American countries, by which a government receiver is appointed to take over, for a temporary period, industrial or commercial businesses which for some reason or other cannot continue to function. During the Revolution the Cuban Government sometimes nationalized domestic enterprises and sometimes intervened them. The tobacco companies were intervened in 1960 and were not nationalized for some time thereafter. Thus, intervention is an intermediate stage, at which no decision has been made as to the ultimate disposition of the enterprise.

to this point there is no question of international law raised, there having been no seizure of the property of any person not a national of Cuba.

The District Court held, and the Court of Appeals agreed, that the intervention, lawful in Cuba, did not give respondents the right to collect accounts receivable from importers in New York, under the doctrine of *Republic of Iraq* v. *First National City Bank,* 353 F.2d 47 (2d Cir. 1965), *cert. den.* 382 U.S. 1027. That case holds that acts of a sovereign will be given extraterritorial effect "only if they are consistent with the policy and law of the United States," 353 F.2d at 51. We have argued elsewhere that the *Republic of Iraq* case is inapplicable to this situation (see *Republic of Cuba* v. *Menendez,* No. 73-1287, petition for certiorari pending in this Court and *infra,* p. 9); we shall not repeat those arguments here except to note that a decision, yea or nay, on our contention ought logically to be made before this case is decided. If, as we contend, *Republic of Iraq* is inapplicable and the intervention decree was effective as against the accounts receivable, this petition must be denied since the funds in suit were properly paid to Cuba and cannot be the subject of a quasi-contractual claim by petitioner.

If, however, as the courts below held, the doctrine of *Republic of Iraq* is applicable, we move on to the next issue, namely, whether having voluntarily paid to respondents money which, 12 years later, the District Court held was due to the former owners, petitioner may now recover

The law authorizing intervention and the intervention decrees are not a part of the record on this petition but they were in the record in *Palicio & Co.* v. *Brush & Block,* 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd* 375 F.2d 1011 (2d Cir. 1967), *cert. den.* 389 U.S. 830. For the convenience of the Court we are printing them as appendices hereto.

that money. On *this* issue the *Republic of Iraq* case is not relevant, as the Court of Appeals held (J.A.23a, 24a). Cuba is not now trying to collect an asset located in the United States. It is seeking rather to hold on to an asset located in Cuba—an asset it claims on the basis of a typical act of state, its original intervention decree.[2]

Thus, this case primarily involves a dispute between a foreign sovereign and its nationals. All of the acts of the Cuban sovereign have been directed at its nationals and have only indirectly affected Dunhill. Indeed, Dunhill's predicament results from the disposition by the United States judiciary of the dispute between Cuba and its nationals.[3]

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[2] The act of state doctrine is applicable even as to property originally located outside the territory of the nationalizing country, when the property is subsequently reduced to possession without violation of law. See A.L.I., *Restatement Second, Foreign Relations Law of the United States,* (1965) § 43, p. 140.

[3] Dunhill's involvement in this dispute was far from involuntary or innocent. The courts below treated Dunhill's payments as payments made by mistake (J.A.24a, 55a). The record does not support such a finding. In September and October, 1960, when it made its payments, Dunhill knew that the Cuban tobacco companies had been intervened and that the Cuban owners had been replaced by government-appointed intervenors. They may not have known, at that time, the precise legal effect in the United States of such a takeover but neither did anyone else. Indeed, the legal effect of the intervention is not clear even now in view of this proceeding and the pending petitions for certiorari.

It would be much more accurate to say that Dunhill took a calculated risk. To have refused to pay or to have paid the former owners might have cut off its source of Cuban cigars just before the profitable Christmas season; to have paid the interventors ran the risk that it might be paying the wrong party. It chose the latter alternative, perhaps on the theory that the dollars in hand was worth the litigation likely to follow. We know of no equitable theory on which Dunhill should recover because it gambled on the result of a lawsuit and lost.

The Court of Appeals found "troublesome" the conduct of the owners and importers at meetings in New York immediately after intervention (J.A. 19a) but found that in any event the transmission of funds by Dunhill to Cuba was not payment of the debt to

For this reason there can be no international law question presented by Cuba's actions. The international law of nationalization is addressed to the sovereign's power to transfer ownership of property owned by an alien and all of the rules advanced by the courts and text-writers on that issue presuppose the alien's ownership of the property in question. See, for example, Amersingle, *State Breaches of Contracts With Aliens and International Law,* 58 Am. J. Int'l L. 881, 904 (1964); Friedman, *Expropriation In International Law* 157-58 (1953); Re, *Foreign Confiscations* 6 (1951). Here, there was no intent to divest Dunhill of ownership. There was never, in the eyes of Cuba, any property right in Dunhill to be divested. Indeed, by anyone's view, Dunhill's rights, such as they are, arise only by operation of law as formulated and applied by the United States courts in adjudicating the effect of Cuba's act of state. Surely such a refusal by the Government of Cuba to agree with the United States courts on a question of law affecting entitlement to property now within Cuba's own territory cannot be characterized as a violation of international law. Nor can it be thought that a nationalization of an *alien's* property contrary to international law occurs because the United States courts consider the intervention of a *national's* property contrary to United States public policy.

We have found no authority, and the petitioner cites us to none, even remotely suggesting that an international law question is presented in these circumstances. On the contrary, it is settled that measures directed against a national which indirectly injure an alien, including an alien

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the former owners, in the sense that it provided a defense to the former owners' claim. Whether that is so or not can await the disposition of the importers' cross-petition for certiorari (*Saks & Co.* v. *Republic of Cuba,* No. 73-1289).

tied by contractual relations to the national, do not present an international law question. See Whiteman, 8 *Digest of International Law* 933 *et seq.*; *Dickson Car Wheel Company (U.S.A.)* v. *United Mexican States*, IV Reports of International Arbitral Awards 681 (1931); *Claim of European Mortgage Series B Corp.*, Foreign Claims Settlement Commission, Decisions and Annotations 246 (1959).

What, then, is the international law issue on which petitioner relies?

This action was instituted in 1961 and has been in active litigation since 1967. Until August 15, 1975 when petitioner filed its supplemental brief it had never suggested that international law had been violated by the respondents. Even now it is difficult to understand from petitioner's brief why it thinks that there is an international law question to be considered. We can only assume that counsel has interpreted this Court's order directing reargument as an instruction to find and argue an international law issue even if none was raised by the record. This cannot be an accurate construction of this Court's order. We respectfully suggest that on this reargument the petitioner should have conceded in all candor that it did not allege any violation of international law and that therefore there was no occasion for a review of *Sabbatino*.[4]

As we read its brief, petitioner argues, first that it has been the victim of discrimination (Pet. Br. 5, 15-17), and

[4] Petitioner's counsel may have been somewhat embarrassed by the position in which they thought they had found themselves. Up to page 7 of its brief petitioner does in fact argue that there is no international law issue involved in the case. At page 8 and thereafter petitioner argues that "if . . . the remarks of Cuba's counsel were sufficient proof of a separate and independent act of state" then there are international law issues to be considered. We do not argue that there was a "separate and independent act of state" but even if there was, that fact could not have created international law issues where none had existed before.

second that the act of state doctrine should not be available at all in an "ordinary commercial transaction" (Pet. Br. 9-15). We will consider these two arguments.

1) No allegation of discrimination was made in the District Court, in the Court of Appeals or in this Court at the original argument last December. It is a bit late in the day to raise such critical allegations. We are not told and we do not know who has been discriminated against or what conduct of the respondents constituted such discrimination. And, as might be expected in such circumstances, there is nothing in the record to support petitioner's unspecified charges. There is no indication that other importers in the United States or elsewhere in the world were treated more favorably than petitioner.

This case is a far cry from the situation in *Sabbatino* in which the District Court and the Court of Appeals found that the conduct of the Cuban Government was discriminatory and retaliatory. That finding (with which we have taken issue from the beginning) was based on the wording of Public Law 851 and Executive Power Resolution No. 1 which directed the nationalization of certain United States-owned enterprises in Cuba. *Banco Nacional* v. *Sabbatino*, 193 F.Supp. 375, 382 (S.D.N.Y. 1961); 307 F.2d 845, 849 (2d Cir. 1962). There are no analogous decrees in this case; the only decree in question is the one which directed the intervention of 51 Cuban tobacco companies but which did not even purport to affect property of a national of the United States. See Appendix, *infra*.

We will not attempt to raise and dispose of still other international law arguments which have *not* been made by the petitioner. In an adversary legal system such as ours, cases should not be decided on the basis of straw men set up and disposed of by the parties to a lawsuit. In any event, we see no substantial international law question in this case.

If this Court believes that significant international law issues are raised by this record, and that those issues are best resolved in this litigation even at this late date, then this case should, at most, be remanded to the District Court for a determination of those issues in the usual course and upon a proper record. In light of the length of time we have been litigating this matter, we view this prospect without enthusiasm, and it may be that petitioner would be barred by the passage of time from raising such issues, but certainly new issues ought not to be raised and decided without a record and without the benefit of lower court decisions.

2) There is no relevance in petitioner's argument that the act of state doctrine is not applicable to "ordinary commercial transactions." We do not agree that the act of state doctrine does not apply to commercial transactions but find no need to argue the point here. It is, of course, absurd to characterize this as an ordinary commercial controversy. It arose, not out of normal international trade, but out of an intervention and it is the intervention which is the act of state, not the repudiation of a commercial debt. Further, the obligation on which Dunhill sues is not a commercial debt at all, but arises from the complex of decisions made by the courts below on the act of state doctrine, the law of payment, the law of quasi-contract and other issues.

As is well known, Cuba's act here was a part of a large scale reorganization of the economic, political and social structure of the government. The act of state with which we are concerned was not directed at Dunhill at all; it was directed at the former owners (and 47 other companies) only in the sense that they, like all other private producers in Cuba, were to be integrated into a new socialist system. It was by no means a commercial transaction; neither

should it have shocked the conscience of this Court. It was done out of consideration for the welfare of the people of Cuba whose interests were paramount in the eyes of the Government.

Cuba here was intervening a going business with overhead expenses to pay, payroll to meet, supplies to purchase and other obligations to satisfy. All of the assets of any going enterprise, including accounts receivable located abroad, are normally called upon to meet such expenses and that is exactly what happened here. The interventor received payments from importers, in the normal course of the operation of the enterprise, which continued without interruption.[4a] Petitioner concedes that Cuba had the right under international law to nationalize (and *a fortiori,* to intervene) the property of its citizens with or without compensation (Pet. Br. 7). In the case of a going business whose principal activity involves the export of a manufactured product, that right is a meaningless one unless it includes funds due to it from abroad. Indeed, in the case of an enterprise (like Cuba's cigar industry) which lives mostly on exports, a major portion of its liquid assets may well, at any time, consist of accounts receivable from abroad. The accounts receivable were not the personal property of the owners of the business, readily separable from the other assets; the were a part of the entity intervened.[5]

A second element in this case relates to the violation of Cuba's Currency Control Regulations. The Regulations in effect during the period covered by this complaint provided that when a Cuban exporter received payment in foreign

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[4a] In fact, checks mailed from New York a day or two before intervention were received by the interventor a day or two after. Schedules attached to Court Ex. 1.

[5] No such considerations were present in *Republic of Iraq, supra.*

currency, it was "required to deliver to the Currency Stabilization Fund, to be exchanged at par for national currency, the dollars representing the price of such exportation . . . within three days following the date of collection thereof." Par. First, Instruction No. 11 of November 3, 1959. The owners, of course, understood when they sold their products that they would be governed by the regulations; they had been operating pursuant to its terms for over a year, and hence they entered into the contracts in question with the expectation and intent that they would get pesos, not dollars (Trial Transcript, pp. 609, 738, 741). By the decision of the courts below they got a windfall, and Cuba is deprived of the currency it would have received from the transaction.

There is nothing in these regulations repugnant to the public policy of the United States; on the contrary, the regulations are typical of similar regulations all over the world.[6] The court below makes much of the fact that payment was, under the contracts of sale, to be made in dollars, not pesos (J.A. 17a). But every contract is made subject to law; the Currency Control Regulations are a part of the law of Cuba and the contracts must be interpreted consistently therewith.

This Court must not be blind to the political and economic considerations present here. Cuba is an agricultural

[6] The United States currency control regulation at issue in *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966), *cert. den.* 385 U.S. 898, is much more inequitable in its operation than the Cuban Currency Control Regulations under consideration here. By the United States regulations Cuban citizens are deprived of their property without compensation; the Cuban Regulation merely specified the currency in which payment was to be received. The United States regulations were justified on the ground that the interests of the United States outweighed the interests of the plaintiff in that case. Can it be said that the interests of Cuba are any less important?

country and can survive only if it exports its products under such conditions that it can purchase manufactured goods. To do this it needs hard currency, and the currency regulations are designed to accomplish this purpose. Realistically speaking there are three parties to the sale of Cuban goods in international trade: the purchaser of the goods, who gets the product; the seller of the goods, who gets pesos; and the banking system of the exporting country, which gets the hard currency.

For these reasons, petitioner's argument that the rule of the law advocated by respondents in this case will have "an impact on international trade [which] would be disastrous" (Pet. Br. 10) has no foundation at all. The decision of this Court need be no broader than the circumstances require, and accordingly need not consider the effect of the act of state doctrine on commercial transactions.

Further, even a broad reading of the act of state doctrine in this case would not affect international trade. Cuba, like most countries, cannot survive without international trade. It is that fact, rather than any rules of law relating to act of state, which impel Cuba and all other countries to honor their commercial obligations. Cuba has developed an extensive foreign trade[7] in the past 15 years and persons dealing with it evidently are not perturbed by the fear that Cuba, acting on the Dunhill precedent, will repudiate its commercial obligations.[8] Such a course would be suicidal.[9]

[7] "In 1973, exports [from Cuba] were reported to have risen 58% to U.S. $1,264 millions and imports 21% to U.S. $1,561 millions. . . ." Pick's Currency Yearbook, 1974, p. 150.

[8] Dunhill's affiliated companies are importing cigars from Cuba in large numbers for sale in Canada and England, not deterred in the slightest by the horrors invoked by the petitioner.

[9] Even if the act of state doctrine does not apply here, the case must still be resolved on the merits. The elimination of the

POINT II

If Relevant, The Decision Of This Court In *Banco Nacional* v. *Sabbatino* Should Be Reaffirmed.

If the *Sabbatino* decision is at all relevant to this proceeding it should be reaffirmed; if any decision of this Court requires review it is *First National City Bank* v. *Banco Nacional,* 406 U.S. 759.

A.

Every year that has passed since Mr. Justice Harlan wrote his opinion in *Sabbatino* has provided fresh evidence of the wisdom and prescience of that opinion. There was good cause, in 1964, for this Court to have stayed out of the worldwide controversy over the international law of nationalization. There is even better reason for the Court staying out of that controversy now. The "disagreement as to relevant international law standards" noted by this Court in its *Sabbatino* decision (376 U.S. at 398) has deepened and become more sharply defined in the years since. Nor is that all. Increasingly, the position of the Executive Branch has been in the minority and is at the present supported by only a few nations. If this Court should be required to declare the applicable law and if it is to be guided (as it must be) by the world consensus on the subject, it will be constrained to take a position contrary to that of the Executive Branch. Such a result cannot help but embarrass the Executive Branch in its dealings with

act of state doctrine from a controversy does not result in automatic judgment for either party. It merely opens the way to the consideration of the merits, which, in this action, are raised by the pending petitions for certiorari (*Republic of Cuba* v. *Menendez,* and *Saks & Co.* v. *Republic of Cuba, supra.*

the rest of the world.[10] Whatever the Executive Branch may think of this possibility,[11] this Court cannot be put in a position in which its decision on the law will adversely affect the international political stance of the United States.[12]

In 1962, the General Assembly of the United Nations had before it a draft resolution which declared that expropriation or requisitioning of private property was lawful if based on national interest. The draft further provided, in paragraph 4:

> "In such cases [of nationalization] the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of

[10] That point may already have been reached at the District Court level in *Banco Nacional* v. *Chase Manhattan Bank,* S.D.N.Y., 60 Civ. 4663, as a consequence of this Court's opinions in *First National City Bank* v. *Banco Nacional de Cuba, supra.* See *infra,* pp. 21, 22.

[11] On page 8 of its brief, petitioner refers to the decision of this Court in *First National City Bank* v. *Banco Nacional, supra,* and particularly to the position taken by the Executive Branch in that case. We remind the Court that for petitioners to prevail respondents are requesting an application of the *First National City Bank* case and of the principles set forth in Mr. Stevenson's letter. The decision of the District Court disregarded the Stevenson letter, leading to the reversal in the Court of Appeals which is here under consideration. We would like this Court to reconsider its decision in *First National City Bank,* but such a reconsideration is by no means necessary in order for us to prevail on this petition.

[12] The problem is becoming more not less serious as the pace of nationalization increases. The State Department's *Report on Nationalization, Expropriation and Other Takings of U.S. and Certain Foreign Property Since 1960* reports that 34 "noncommunist" countries have nationalized foreign-owned assets and that the trend has been rising since 1960. Bureau of Intelligence and Research, Research Study RECS-14, Nov. 30, 1971; XI Int'l Legal Materials 84 (Jan. 1972). See also annex to Report of Economic & Social Council, U.N. Gen. Ass. Document A/9716, 20 Sept. 1974.

> compensation gives rise to a controversy, national jurisdiction should be resorted to. Upon agreement by the parties concerned, settlement of the dispute may be made through arbitration or international adjudication." U.N. Gen. Ass. Off. Rec. 17th Sess. A/5344/Add. 1, 12 December 1962 at 3.

Two amendments were proposed: First, to insert a sentence providing that the General Assembly "confirms the inalienable right of peoples and nations to the unobstructed execution of nationalization, expropriation and other essential measures aimed at protecting and strengthening their sovereignty over their national wealth and resources"; second, to replace the second sentence of the committee draft with the following: "The question of payment of compensation to the owners shall in such cases be decided in accordance with the national law of the country taking those measures in the exercise of that sovereignty" (*id.* at 7). Two roll call votes were taken. On the first amendment the vote was 30 to 30, with 34 nations abstaining (*id.* at 15). The second amendment was rejected by a vote of 39 to 28, with 21 abstentions (*id.* at 16). As everyone understood at the time, the language of the Resolution that was passed (Res. 1803) begged the question, since it left open the sharply disputed issue as to just what was required by international law. And it was equally clear that a large segment of the international community preferred some other formulation of their rights and duties.

The sharp and close division that had developed in the General Assembly presaged further changes. In the years following the adoption of Resolution 1803, the United Nations not only continued but increased its interest in the matter. And as new nations emerged from their colonial or quasi-colonial status, so the law developed and changed. Today we have reached the point where it may reasonably

be said that there is a consensus among the nations of the world as to the law of nationalization—but that the United States, together with a small handful of other capital exporting nations, has not accepted that consensus. If there ever was a situation where participation of this Court would be dangerous to both the national interest and the Court, this is it.

It would be tedious to trace all of this development in the United Nations since 1964, but a few of the high points may be noted. On October 19, 1972 the Trade and Development Board of UNCTAD (United Nations Conference on Trade and Development) adopted a resolution which again recognized the sovereign right of all nations to nationalize their resources and then proceeded to resolve that:

> "in the application of this principle, such measures of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts, without prejudice to what is set forth in General Assembly Resolution 1803 (XVII)." U.N. Document TD/B/421, 5 Nov. 1972; XI Int'l Legal Materials 1474 (Nov. 1972)

On February 5, 1974 the General Assembly, again referring to its Resolution 1803, proceeded to affirm

> "that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation

of each State carrying out such measures." U.N. Gen. Ass. Document A/RES/3171 (XXVIII) 5 Feb. 1974; XIII Int'l Legal Materials 238 (Jan. 1974).

This resolution was adopted by a vote of 108 to 1 with 16 abstentions. The abstainers included the United States, France, Belgium, Italy, Japan, the Netherlands, Norway, Portugal and South Africa; the sole dissenting vote was cast by the United Kingdom.

During the year 1974 the United States moved from a position of abstention to a position of active opposition to the views of the vast majority of the members of the United Nations who, in turn, drew even farther away from the traditional position of the United States. This culminated in the Charter of Economic Rights and Duties of States adopted by the General Assembly on January 15, 1975. The most controversial article of that Charter was Article 2(c) which reads as follows:

"2. Each State has the right:

• • •

(*c*) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means." U.N. Gen. Ass. Doc. A/RES/3281 (XXIX), 15 Jan. 1975; XIV Int'l Legal Materials 251, 255 (Jan. 1975)

In the course of debate several amendments were offered, the most important of which was submitted by the United States and 13 other nations, proposing to substitute for the language in Art. 2(c) a provision that "each state has the right . . . to nationalize, expropriate or requisition foreign property for a public purpose, provided that just compensation in the light of all relevant circumstances shall be paid." This proposal was defeated by a vote of 87 to 19 with 11 abstentions. The text above set forth was then adopted by a vote of 104 to 16 with 6 abstentions.[13] XIV Int'l Legal Materials 265 (Jan. 1975).

It is not only the United Nations which has taken a position in opposition to that of the United States. The Third World Nations, which have formally styled themselves "The Non-Aligned Powers" (originally known as the "Group of 77") have been holding international conferences for the past few years to consider problems of particular importance to them including, of course, problems arising out of the international law of nationalization. The Fourth Conference of the Heads of State of the Non-Aligned Countries, held in Algiers in 1973, resolved that:

"Any infringement of the right of effective control by any State over its natural resources and their exploitation by means suited to its own situation, having respect for the ecological balance, including nationalization and the transfer of property to its nationals, is contrary to the aims and principles of the United Nations Charter and hampers the development of inter-

[13] In addition to the United States, negative votes were cast by Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Spain, Sweden and the United Kingdom. Australia, Barbados, Finland, Israel, New Zealand and Portugal abstained. Every Latin American country, every African country and every Asian country except Japan voted in favor of the Resolution.

national cooperation as well as the maintenance of international peace and security.

The Conference gives its unreserved support to the application of the principle that nationalization carried out by States as an expression of their sovereignty, in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and its mode of payment and that any disputes which might arise should be settled in accordance with the national legislation of each State." Documents of the Fourth Conference of Heads of States of Non-Aligned Countries, U.N. Document A/9330, p.67

International meetings of lawyers have from time to time also directed themselves to the same problem. The International Association of Democratic Lawyers at its Ninth Congress held in Helsinki in 1970 adopted a resolution declaring that the exercise of the right of nationalization could not be subject to any conditions except that provided for in national legislation and that the only competent tribunal to deal with conflicts between states and investors were those of the state in which the capital was invested. And the same organization at its Tenth Congress held in Algiers in 1975 adopted a report which said, among other things:

"b) It cannot be said that the classical standard of 'prompt, adequate and effective compensation' which moreover was never universally accepted even by the western countries, was ever a universally-accepted principle in International Law. The question of compensation is a matter of domestic jurisdiction of the nationalising country as is emphasized by the Charter of the Economic Rights and Duties of States. The domestic tribunals of a state have exclusive jurisdiction in disputes concerning nationalisation, including compensation, and the attempt by western countries to submit these disputes to international arbitration must be discouraged as a limitation on the right to nationalise."

• • •

"Cases involving the nationalisation of alien property have come before the courts of western countries, involving property which has been nationalised. In deciding those cases, the courts have had recourse to international law, but the law was applied according to the old rules designed primarily to protect the interests of investors in the underdeveloped countries of the pre-1945 era. And so they have held nationalisation to be illegal on the grounds that it has been carried out without 'prompt, adequate and effective compensation', or that it has been 'discriminatory or retaliatory'. Iran, Indonesia, Cuba, Chile, Libya and other countries have been involved in such litigation and the threat of legal action by the former owners of nationalised property has impeded the trade and commerce of developing nations.

It therefore becomes important to find means for bringing to the attention of these courts, in a forceful and authoritative fashion, the fact that most of the nations of the world do not accept any version of international law which places restrictions on the right to nationalise." [14]

And finally, a meeting of the Association of American Jurists held in Panama in June, 1975 passed a resolution which reads in part as follows:

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[14] Copies of the I.A.D.L. Resolution, and of the Resolution of the Association of American Jurists, *infra* have been deposited with the Library of the Court and have been provided to opposing counsel.

"2.2 The State that nationalizes through a normal exercising of its sovereign authority is the only element capable of resolving the question of whether or not to pay compensation, and if so, how much and in what form. This process will be developed according to the laws of the State. The pretension of demanding 'prompt, adequate and effective' or 'just and proper' compensation—which some legislatures and imperialist governments expect as compensation for expropriation, planning to make this a rule of International Law—does not fall within the legal principles provided for nationalization.

2.3 In all cases of conflict over compensation that arise between the State that chooses to nationalize and the private owners affected by said nationalization (even when foreign), resolution should be given according to the laws and courts of the State that chooses to nationalize."

It might reasonably be argued that the effect of the adoption of the Charter of Economic Rights and Duties of States is to make the conclusion in *Sabbatino* a rule of international law insofar as it holds that the domestic courts of the United States may not pass upon compensation claims against other nations arising out of the nationalization of property owned by aliens. But we need not go so far at this point. This Court in its *Sabbatino* decision arrived at the same solution based upon our own constitutional system and the doctrine of the separation of powers. This is fortunate; otherwise this Court would be catapulted into the midst of a wide-spread international controversy as to the substantive law governing compensation in cases of nationalization and, as has been pointed out above, the Executive Branch is in a small minority on that question of substantive law.

B.

Quite aside from the recent developments in the international law as recited above, grave difficulties are encountered when the *Sabbatino* rule is discarded. The situation in *Banco Nacional* v. *Chase Manhattan Bank*, U.S.D.C., S.D.N.Y., 60 Civ. 4663, pending at the District Court level in New York, is illustrative.

Following this Court's decision in *First National City Bank* v. *Banco Nacional, supra,* and the subsequent Court of Appeals decision holding that Cuba's conduct in nationalizing the property of the United States banks in Cuba violated international law, *Banco Nacional* v. *First National City Bank,* 478 F.2d 191 (2d Cir. 1973), the *Chase* case came on for trial in the Southern District of New York. *Chase* is identical with *First National City Bank* except that the amount of money for which Banco Nacional is suing is much greater and there is a substantial issue as to the amount of the excess due to plaintiff over the amount of the counterclaim—an excess which this Court agreed in *First National City Bank* belonged to Banco Nacional. To determine the amount of that excess it became necessary to determine how much compensation Chase was entitled to on its counterclaim, under international law.

Never in this country, or, so far as anyone can determine, in any country, has a court been called upon to determine how much compensation is due under international law to a company whose property has been nationalized. The stated position of the United States State Department has traditionally been that the owner of the property is entitled to compensation which is "prompt, adequate and effective." See, for example, the *United States Statement on Economic Assistance and Investment in Developing Nations,* Jan. 19, 1972, printed in XI Int'l Legal Materials 239, 241 (Jan. 1972); also 71 Dept. State Bulletin 477,

481 (1974). But it has long been recognized that in fact international law (as manifested by the practice of nations) recognizes no such standard. See, for example, Lillich, *The United States-Hungarian Claims Agreement of 1973*, 69 Am. J. Int'l L. 534, 557 (1975); Dawson & Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?*, 30 Fordham L.Rev. 727 (1962); Friedmann, *National Courts & the International Legal Order*, 34 Geo. Wash. L.Rev. 443, 452-454 (1966); Nicholson, *The Protection of Foreign Property Under Customary International Law*, 6 B. C. Ind. and Com. L.Rev. 391, 401 (1965); Wesley, *Establishing Minimum Compensation Criteria for Use in Expropriation Disputes*, 29 Vand. L.Rev. 939 (1972); Weigel & Weston, *Valuation Upon the Deprivation of Foreign Enterprise: A Policy-Oriented Approach to the Problem of Compensation Under International Law*, 1 The Valuation of Nationalized Property in International Law, 3, 8 (ed. Lillich, 1972). The District Court is thus faced with the prospect that the *Sabbatino* decision was designed to avoid—namely, the possibility that its decision on the international law of compensation will be in conflict with the political stance of the Executive Branch.

CONCLUSION

We have in this brief confined ourselves to the issues raised by the Court in its order directing reargument and have not repeated all of the contentions argued by us at the October, 1974 Term of this Court. The Court will, of course, understand that we are not waiving any of the arguments that were made then. We still urge, as we did then, that no intelligent disposition can be made of this complex litigation except by consideration of the issues still pending in the petition and cross-petitions for certiorari Nos. 73-1287 and 73-1289. Logically therefore the Court should either dismiss all of the petitions or hear all of them.

Isolation of the single issue raised by the petition now under consideration will result in a distortion but even then a decision on this issue must be made in favor of the respondents. The Court of Appeals was quite correct in holding, first, that this was an act of state and second, that *First National City Bank, supra*, at the very least prohibits an affirmative judgment in favor of petitioner against respondents. We respectfully refer the Court to the briefs filed on the original petition for certiorari.

One final word. If this Court feels that a review of the holding in the *Sabbatino* case is appropriate, we respectfully suggest that this is not a good case for such a review. There are other cases close behind in which an opportunity will be given to review that decision on a record which raises, in a more precise form, the legal issues presented by *Sabbatino*.

For the reasons previously stated, the Writ of Certiorari was improvidently granted and should be dismissed. Alternatively, the judgment of the Court of Appeals should be affirmed.

Victor Rabinowitz
Attorney for Respondents
30 East 42nd Street
New York, New York 10017

Michael Krinsky
Dorian Bowman
Of Counsel

October 1, 1975

APPENDIX

APPENDIX

(CUBAN LAW NO. 647)

MINISTRY OF LABOR

I, OSVALDO DORTICOS TORRADO, President of the Republic of Cuba, do hereby make known that the following law has been enacted by the Council of Ministers and approved by me, to wit:

WHEREAS it is the duty and inherent function of the Government to regulate the economic relations between the different production factors of the Country, preventing any activity which might directly or indirectly disturb its economic stability.

WHEREAS the Revolutionary Government is determined to insure a normal operation of all work centers, thereby also insuring the production of the staple goods and commodities indispensably needed by the population and, incidentally the subsistence of the Nation's sources of labor employment and the effective development of its economy.

WHEREAS the foregoing considerations make it advisable for the Government to contribute to the reorganization and administration of the business concerns that are not operating with the required regularity, so as to insure their efficient operation, the maintenance of their production levels, and the development, to the extent possible, of the respective work centers.

WHEREAS it is also a necessary function of the Government to mobilize whatever resources may be necessary for a practical solution of the financial problems of these enterprises or businesses that require such assistance,

provided it will redound to the benefit of the national production and of the workers involved.

WHEREAS whenever the Government applies any funds of the State for the benefit of a private business it ought to receive adequate compensation for such accommodation consisting of the reimbursement of the funds so used, plus interest, and a share of the earnings or profits of the business so benefited, in the proportion which such contribution or investment bears to the amount representing the actual worth of the concern.

NOW, THEREFORE: In pursuance of the powers conferred upon them, the Ministers of the Cabinet, in Council assembled, have resolved to enact the following

LAW No. 647

ARTICLE 1. The Minister of Labor is hereby authorized to provide for the seizure (intervention), whenever he shall deem it necessary, of the work centers or enterprises at which the normal production rate is ostensibly altered.

ARTICLE 2. The Minister of Labor shall exercise the authority conferred upon him by the foregoing Article One, in the following cases:

a) Lock-out or temporary or permanent closing which results in a stoppage of the work center involved.

b) Serious labor conflicts.

c) Mass dismissals of workers.

d) Non-compliance with resolutions of the Courts of Justice, or with awards or resolutions issued by the Minister of Labor in connection with labor conflicts.

ARTICLE 3. The Minister of Labor, in ordering the seizure (intervention) of a work center, shall provide therefor in a duly explained resolution wherein a clear statement of the causes giving occasion thereto shall be included, together with the name of the Official (Interventor) designated to take possession of the firm, and the powers vested in him.

The same resolution shall specify the salary to be paid to such Official (Interventor) during his tenure of his office as such.

ARTICLE 4. The seizures (interventions) ordered by the Minister of Labor in pursuance of this law may not last for more than six months. Provided, however, that if an extension of this period should be necessary in order to accomplish the purposes for which the seizure was originally ordered, such action will require an Executive Order of the President of the Republic, which will be issued on the recommendation of the Minister of Labor, and the duration whereof may not exceed six months.

ARTICLE 5. The "Interventors" designated hereunder shall be vested with all the powers required to manage and direct the concern or enterprise (work center) covered by the respective seizure resolution, and all the authority regularly exercised by its executives; wherefore they shall be subrogated to the standing, powers and privileges of the respective employer, without thereby precluding the specification, in the resolution providing for the intervention and designating the Interventor, of the scope of the functions and authority of the latter.

ARTICLE 6. It is hereby prohibited to close, temporarily or permanently, any enterprise or work center without

prior authorization of the Minister of Labor. The physical and corporate persons who, as owners or holders under any other authority of any enterprise or work center, believe it to be best for their interests to close such enterprise or work center, shall first apply for the required authorization to the Minister of Labor, who may, within the thirty days next following the filing of such application, either comply therewith or provide for the seizure (intervention) of the work center involved, on the terms and conditions provided for in this law.

Once the thirty day period referred to in the above proceeding paragraph shall have elapsed, the responsibility of the employer in the case insofar as the obligation hereby imposed on him is concerned shall be considered saved, and he may then proceed as per his application.

Article 7. In all cases where judicial proceedings are started for the bankruptcy or suspension of payments of any commercial or manufacturing concern which is a work center, the Judge shall so notify immediately the Ministry of Labor on the start of the proceedings, suspending further action for a period of thirty days.

The Minister of Labor may, within the time mentioned in the preceding paragraph, order the seizure (intervention) of the industry or business, immediately notifying the Court handling the matter, in which case the proceedings will remain suspended until the time for which the seizure (intervention) has been ordered, or its extension, as the case may be, has elapsed.

If fifteen days elapse without any seizure (intervention) having been ordered, or prior thereto, the Minister of Labor notifies the Judge of his intention not to seize the work

center, the proceeding will be continued through all its steps as provided by law.

Article 8. In cases where it be necessary to obtain financing of any kind for the purpose of developing the industry, the Interventor shall pally [sic] therefor to the Minister of Labor, who shall provide it, if he deems it beneficial, through Banco Nacional de Cuba, the Banfaic, the Bandes or any other state or private or quasi state institution.

In cases where it is not possible to obtain the required financing from the institutions referred to in the preceding paragraph or if the pressing nature of the matter so requires it, the Council of Ministers, on motion of the Minister of Labor, may grant the required credits to the extent necessary to maintain the normal operation of the enterprise or business.

Whenever the State contributes with its own funds in accordance with the provisions of this article, it may choose:

a) To participate in the profits of the enterprise in the part thereof corresponding to the capital contributed in relation to its total capital, in which the contribution of the State will be included.

b) To consider itself as a privileged creditor, the company or business that has received the State contribution being obliged to repay the same out of its profits, and the pending balances bearing interest at the rate of 6% per annum.

In cases where the State chooses to be a partner in the enterprise, it will be represented thereat by the person appointed by the Industrialization Department of INRA, which appointment shall be made in accordance with the

powers vested by the law creating the Institution in question.

Article 9. The seizures (interventions) which, pursuant to this law, may be ordered by the Minister of Labor shall cease once they have accomplished the purpose sought, or when the crisis that caused it has been overcome, and, in the last instance, upon the expiration of the time ordered for its extension.

Once the intervention ordered under the terms of this law has ended, the Interventors shall be required to render a detailed account of their activities to the Minister of Labor within fifteen days counted from the day after than on which they have ceased as such interventors, which time may be extended for fifteen more days for just cause.

Article 10. Without prejudice to what is provided by this law, the person who orders the temporary or definitive closing down of any enterprise or work center without fulfulling the provisions of Article 6 shall be punished with a fine of 31 to 180 quotas or arrest for from 31 to 180 days, or both penalties, the matter being brought before the Correctional Judge of the district in which the business is located. The same penalty will be incurred by the Interventors who fail to render an account of their activities within the period granted therefor, and its extension, if any.

Transitory Provisions

The bankruptcy or suspension of payments proceedings that are being processed when this law is promulgated shall be suspended for a period of fifteen days at the step in which they may be, with notice to the Minister of Labor for the purposes provided for in Article 7; such cases to be

continued if within that time the seizure (intervention) is not ordered and the matter is referred to the Judge or Court handling the proceedings.

Final Provisions

First: The Minister of Labor is hereby charged with the enforcement of this law.

Second: All legal and regulatory provisions found to be in conflict with this law, which will take effect on the date of the publication thereof in the Official Gazette of the Republic, are hereby derogated.

Done at the Presidential Palace, in Havana, on this 24th of November, 1959.

Osvaldo Dorticos Torrado
Fidel Castro Ruz,
Prime Minister.

Augusto R. Martinez Sanchez,
Minister of Labor.

(Official Gazette No. 224 of November 25, 1959)

Appendix

(CUBAN LAW NO. 843)

(Translation from Spanish)

OFFICIAL GAZETTE HAVANA, PUBLISHED JULY 6, 1960

Law No. 843.

Amendment to the INTERVENTION LAW (647) of November 24, 1959.

I, OSVALDO DORTICOS TORRADO, President of the Republic of Cuba.

Proclaim: That the Council of Ministers has agreed and I have sanctioned the following:

WHEREAS: Law Number 647 of November 24, 1959, published in the OFFICIAL GAZETTE of the 25 day of the same month, empowers the Minister of Labor, by the procedures laid down therein and in the cases contemplated in its Article II, to proceed to intervention of Enterprises or Centers of Labor in which the normal course of production is obviously impaired.

WHEREAS: It has been observed that various court proceedings are pending against various intervened enterprises or centers of labor, by virtue of obligations contracted by them before the Intervention Orders; in which proceedings, if the decisions handed down therein were put into effect, the intervention might be rendered ineffectual and the closing of the centers of labor might ensue.

WHEREAS: Article 222 of the Constitution of the Republic states that it is the duty of the State to orient the nation's economy for the benefit of the people, wherefore, in compliance with this principle, it is fitting to order what

Appendix

measures may be called for, such as seeing to it that the goals of the interventions are attained, suspending execution of the court decisions ordered against interested enterprises.

WHEREAS: At the present time many intervened centers of labor need to have the interventions that have been ordered extended therein, since the reasons for ordering them persist, which renders it unnecessary for such extension to be specially ordered for each of them, if a general procedure can be followed.

Therefore: By virtue of the powers vested in it, the Council of Ministers has decided to proclaim the following:

LAW NO. 843.

Article 1—Article Four of Law Number 647 of November 24, 1959 is amended to read as follows:

Article Four: The term set for the duration of interventions ordered by the Minister of Labor, pursuant to the provisions of the present Law, may be extended as many times as may be necessary to attain the purposes of the intervention, by a Decision of Minister of Labor.

Article 2—The courts shall not issue any executory decree against enterprises that have been intervened by the State, so long as the intervention is in effect, for obligations contracted prior to the date on which intervention was ordered.

TRANSITIONAL CLAUSES

First: The Minister of Labor may, by appropriate Decisions, extend interventions ordered under Law No. 647 of November 24, 1959, prior to the entry into force of this Law,

when so required for attaining the purposes of the intervention.

Second: Court proceedings in the course of execution at the time this Law is promulgated, and directed against enterprises which are intervened by the State, shall be interrupted at the point they have reached, so long as the intervention is in force.

Court proceedings which have not reached the stage of execution shall be continued until that phase of procedure, at which they shall be suspended, so long as the intervention is in force.

EXECUTORY CLAUSE

Any provisions of the law or regulations contrary to the provisions of the present Law are repealed, and the present law shall go into effect from the time of its publication in the OFFICIAL GAZETTE of the Republic.

WHEREFORE: I order that the present Law be complied with and enforced in all its parts.

GIVEN in the Presidential Palace, in Havana, on June 30, 1960.

OSVALDO DORTICOS TORRADO
FIDEL CASTRO RUZ,
Prime Minister.

AUGUSTO R. MARTINEZ SANCHEZ,
Minister of Labor.

mr/ap.

(Resolution No. 20260)

REPUBLIC OF CUBA

MINISTRY OF LABOR

GRACIELA TASENDE MUNECAS
Head of the Office of the Minister of Labor
Name and Post of the Official

CERTIFYING: That by the Minister of Labor ————————
on a matter related to the Departmente ————————
has been dictated the following

RESOLUTION N° 20260

Having seen the File No. 1156/60, settled under the Law 647 of November 24th., 1959 in the Intervention Department of this Ministry, and:

WHEREAS: The Legal Representation of the National Tobacco Federation of Labor has been denouncing to this Ministry the crisis created in its sector as a consequence of the policy carried out by the cigar and cigarette manufacturers and tobacco leaf wholesalers, which has provoked a considerable shrinkage or the production, the displacement of a great number of laborers and serious injury to the national economy.

WHEREAS: It is evident the attitude or selfishness and open hostility to the economic development of the nation, adopted by the employers of the tobacco sector with the development of a narrow commercial policy viewing only the obtention of greater profits—for their personal lucre, diminishing extraordinarily the production for internal consumption, as well as that destined for export to the natural

markets of Cuba, a dimunition exceeding 15 million units in the first semester of the current year, as a consequence of the excessive increase of the prices.

WHEREAS: The employers' attitude attempting against the economic interests of the country and of the laborers has had no limits and has been shown in all the aspects in connection with production, from the sale of the raw material they should have on deposit to manufacture the several types of blend, the refusal to acquire the one corresponding to the new crops, the total neglect of the several departments of the factories, have brought as a consequence a considerable shrinkage in the quality of the product that has been losing not only prestige but the markets in the habitual countries.

WHEREAS: The withdrawal of the operating capital from the industries by the employers has contributed, besides, to the ostensible restriction and limitation of production, exclusively developing their activities on the basis of loans mainly from the State, which determines that the employers' attitude is consciously directed to provoke a situation of disorganization and stagnation of the industry with the consequent injury which same represents.

WHEREAS: The cigarette enterprises as well as other tobacco-magnates have participated in the resistance to raise the new crop, to buy raw material and apply their own economic resources for the development of their activities, having on their side, as allies, the great wholesalers of tobacco leaf.

WHEREAS: Some of these employers have abandoned their businesses and have absented themselves from the national territory leaving numerous debts and jobless labor-

ers, which constitutes an increase in the problematic situation of unemployment which the Revolutionary Government and mainly this Ministry should avoid.

WHEREAS: It becomes necessary to guarantee the supplies to the habitual markets of Cuba, producing tobacco with the quality that has always distinguished the Havana tobacco, for all of which it is imperative that the Revolutionary Government adopts the necessary measures in order to normalize the situation created in the national cigar and cigarette industry, securing the stability of the laborers in their jobs and the production in general, therefore it proceeds to decree the intervention of the laboring centers in which the facts stated in the preceding Whereases occur, and which are:

CIGAR FACTORIES: Hijos de J. Cano y Cia., sita en San Gabriel No. 301, Cerro; Castañeda, Montero, Fonseca, S.A., Galiano No. 466 Habana; Cifuentes y Cía., Industria No. 520, Habana; Menéndez, García y Cía., Ltda., Amistad No. 407, Habana; F. Palicio y Cía. Máximo Gómez No. 51, Habana; Romeo y Julieta Fábrica de Tabacos S.A., Padre Varela No. 152, Habana; Tabacalera Cubana S.A., Agramonte No. 106, Habana; Tabacalera Pita Hnos. S.A., Estévez No. 67, Habana; Por Larrañaga, S.A., Carlos III No. 713, Habana; Tabacalera José L. Piedra S.A., Avenida 57 No. 13402, Marianao; Martínez y Cía., Avenida 51 No. 13606, Marianao; Tabacalera Moya S.A., Bayamo, Oriente; Bauzá y Yanes, Agramente y República Cabaiguán, Las Villas; Rey del Mundo Cigar Co., Padre Varela No. 852, Habana; Villaamil Santalla y Cía., República No. 2118, Artemisa. P. del Río; A. Quintero y Cía. S.L., D'Clouet 16-18, Cienfuegos. CIGARETTE FACTORIES: Hijos de Domingo Méndez, Clavel No. 13, Habana, Torres GenerHnos. S.A.,

Máximo Gómez No. 51 Habana; Calixto López y Cía., Agramonte 702, Habana; Cigarros H. Upmann S.A., Ave. 20 de Mayo No. 520, Habana; Villaamil SantaIla y Cía. S.L., Campanario No. 1002; Trinidad Hnos. S.A., Ranchuelos, L.V.; Tabacalera Cubana, S.A., Princesa No. 202, Habana Sres. Ramón Rodríguez e Hijos, S. en C., 23 No. 1255, Vedado, Habana; Cía Inmobiliaria Arroyo Arenas S.A., Arroyo Arenas, Habana; Azan y Hnos., Zayas y Crombet, Santa Clara, Las Villas; Trinidad Industrial S.A., Santo Domingo No. 95, Trinidad, L.V.; Cigarrera Nacional S.A., Antonio Maceo y San Mateo, Santa Clara, L.V.; Fábrica de Cigarros Camagüey S.A., Camagüey; Distribuidora Montemann S.A., Ave. 20 de Mayo No. 520, Habana. Tobacco Leaf Warehouses: Cuba Tobacco S.A., Figuras No. 109, Habana; S. Ruppin Havana Tobacco Co. Inc., Carlos III No. 613, Habana; Rothschild-Samuel-Duignan, S.A., (Havana Tobacco), Dragones No. 108, Habana; J. B. Diaz y Cía., Pasco de Martí No. 115, Habana; Leslie Pantin & Son Escobar No. 451, Habana; Toraño y Cía., Estrella No. 157, Habana; Tabacalera Hijos de Diego Montero S.A., Figuras No. 182, Habana; Cueto Toraño y Cía., Enrique Barnet No. 109, Habana; Junco y Cía, Lealtad No. 1013, Habana; H. Duys Co., Havana Tobacco S.A., Cable Nueva No. 75, Habana; García y Vega, Virtudes No. 256, Habana; Tabacalera Severiano Jorge S.A., Amistad No. 360, Habana; José Toraño y Cía., Avenida Simón Bolívar No. 152, Habana; Cía. Tabacalera del Caribe S.A., Industria y Barcelona, Habana; Domingo Méndez y Cía., Cárdenas No. 115, Habana; Cuban Land and Leaf Tobacco Co., Agramonte No. 106 y Luyané No. 204; Habana; Pollack y Compañía, S.A., San Carlos No. 816 Habana; Liduvino Vizcaíno Valdés, Estrella No. 610, Habana; Menéndez y Cía, S.L., Calle 24 No. 112 entre 11 y 13, Vedado, Habana; Menéndez y Cía., Amistad No. 405, Habana; Menéndez y Cía., Salud No. 59; Habana; Samuel Gordon y Compañía

S.L., Lealtad No. 612, Habana; Standard Havana Tobacco Co., Antonio Maceo No. 164 Santa Clara, L.V.

Whereas: Having heard the opinion of the Central Planning Board and in use of the faculties granted me by the Law 647 of November 24th, 1959, modified in its 4th Article by Law 843 of June 30th, 1960.

I Resolve:

First: Order the intervention of the entities detailed in the last Whereas of this Resolution, for the term of a year.

Second: Appointing as Interventors of this Ministry in the referred to entities: Onelio Quiñones Gonzáles en Hijos de J. Canjo y Cía., sita en San Gabriel No. 301, Cerro, Habana; Narciso Quintana Rivas, en Castañeda, Montero, Fonesca, S.A., Industria 520, Habana. Orlando Montesino en Menéndez García y Cía. Ltda. Amistad 407, Habana; Manuel Salgado en F. Palicio y Cía., S.A., Máximo Gómez No. 51, Habana; Alfredo Cañal en Romeo y Julieta, Fábrica de Tabacos, S.A., Padre Varela 152, Habana; Pedro Ramirez en Tabacalera Cubana S.A., Agramonte 106, Habana; Reinaldo Legón en Tabacalera Pita Hnos. S.A., Estevez 67, Habana; Calixto Rodríguez en Por Larrañaga S.A., Carlos III No. 713, Habana; Oscar Zamora en Tabacalera José L. Piedra S.A., Ave. 57 No. 13402, Marianao; Laureano León en Martínez y Cía., Avenida 51 No. 13606, Marianao; Abdón Honet Perich en Tabacalera Moya S.A., Bayamo; Manuel Cáceres en Bauzá y Yanes, Agramonte y República, Cabaiguán: Reineiro Echeva ría en Rel del Mundo Cigar Co., Padre Varela 852, Habana; Rogoberto Sancho en Villaamil S. Santalla y Cía., República 2118, Artemisa; Fermín Hejas en A. Quintero y Cía. S.L., D'Clouet 16-18,

Cienfuegos, L.V.; Blanco Vázquez en Hijos de Domingo Méndez, Clavel No. 13, Habana; Francisco Carballo Hernández en Torres Gener Hnos. S.A., Máximo Gómez 51 Habana; Hilario de Armas en Calixto López y Cía., Agramonte 702, Habana; Orlando Perras en Cigarros H. Upmann, S.A., 20 de Mayo 520, Habana; Arturo Menéndez en Villamil Santalla y Cía., S.L., Camapanario 1002, Habana; Santiago Padrón Perez en Trinidad y Hnos. S.A., Ranchuelo, Las Villas; Máximo no Arias en Tabacalera Cubana S.A., Princesa 202, Habana; Dionisio Monteagudo Ledón en Sres. Ramón Rodríguez e Hijos, S. en C., 23 No. 1255, Vedado, y en Cía., Inmobiliaria Arroyo Arenas S.A.; Nelson Peña Gómez en Azan y Hnos., Zayas y Crombet, Santa Clara, y en Cigarrera Nacional S.A., Antonio Macco y San Mateo, Santa Clara; José Luis Pajón en Trinidad Industrial S.A., Santo Domingo 95, Trinidad, Las Villas; Francisco Hernández Maidagon en Fábrica de Cigarros Camagüey S.A., Camagüey; Francisco Sánchez en Distribuidora Montemann S.A., 20 de Mayo 520, Habana; Armando Lobeto Alvarez en Cuba Tobacco S.A., Figuras 109, Habana; S. Ruppin Havana Tobacco Co. Inc., Carlos III No. 613, Habana; Rothschild-Samuel-Duignan, S.A., Havana Tobacco, Dragones 108, Habana; J. B. Díaz y Cía., Paseo de Martí 615, Habana; Leslie Pantin & Son, Escobar 451, Habana; Torano y Cía., Estrella 157, Habana; Tabacalera Hijos de Diego Montero S.A., Figuras 182, Habana; Cueto Toraño y Cía., Enrique Barnte 109, Habana; Junco y Cía., Lealtad 1013, Habana; García y Vega, Virtudes 256, Habana; Tabacalera Severiano Jorgge S.A., Amistad 360, Habana; José Teraño y Cía., Avenida Simón Bolívar 152, Habana; Cía. Tabacalera del Caribe S.A., Industria y Barcelona, Habana; Domingo Méndez y Cía., Cárdenas 115, Habana; Cuban Land & Leaf Tobacco Co.,

Agramonte 106 y Luyanó 204 Habana; Pollack y Cía. S.A., San Carlos 816, Habana; Liduvino Vizcaino Valdés, Estrella 610, Habana; Menéndez y Cía. S.L., Calle 24 No. 112 entre 11 y 13, Vedado, Habana; Menéndez y Cía., Amistad, 405, Habana; Menéndez y Cái., Salud 59, Habana; Samuel-Gordon y Cía. S.L., Lealtad 112, Habana; Standard Havana Tobacco Co., Antonio Macco 114, Santa Clara, Las Villas.

Third: Subrogate in the place and degree of the Management of the intervened entities the appointed Interventors, with faculties to open bank accounts; accept, endorse, discount, or in any other way negotiate bills, letters or any other mercantile documents; solicit and obtain credits; perform operations of purchase or sale of national or foreign holdings; borrow money with or without guarantee, stipulating type of interest, expiration, place of payment, type of money and all other particulars which he deems convenient; negotiate when he thinks it is timely the overdrafts in current accounts; pignorate, mortgage or in any way encumber any assets belonging to the Enterprise; buy, change or sell or in any other way operate in or with stocks, bonds, and other securities; rent safe deposit boxes, depositing in same and freely withdrawing its contents; negotiate working conditions with the laborers and employees of the Enterprises, as well as subscribing collective labor agreements on behalf of same; pay the payrolls of employees and laborers; to represent the Enterprises legally in and outside of court, and any other faculty deemed necessary for the development of their operations.

Fourth: Order the appointed Interventors to take inventory of and appraise the goods and chattels belonging to the intervened Enterprises.

Appendix

Fifth: Notify the parties according to law.

Issued in Havana, Ministry of Labor, to

August R. Martínez Sànchez
Minister of Labor

And to notify .....

I issue the present writing, in .....

to .....

Supreme Court, U. S.
FILED
DEC 8 1975
MICHAEL RODAK, JR., CLERK

No. 73-1288

In the Supreme Court of the United States

OCTOBER TERM, 1975

ALFRED DUNHILL OF LONDON, INC., PETITIONER

v.

REPUBLIC OF CUBA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Solicitor General,
REX L. LEE,
Assistant Attorney General,
KEITH A. JONES,
Deputy Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 73–1288

ALFRED DUNHILL OF LONDON, INC., PETITIONER

v.

REPUBLIC OF CUBA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will address the question whether a foreign state's repudiation of a commercial obligation precludes entry of judgment in favor of the private claimant.

INTEREST OF THE UNITED STATES

This case requires consideration of the interrelationship of the doctrine of foreign sovereign immunity and the act of state doctrine as they apply to commercial litigation to which a foreign state is a party. In the conduct of its foreign relations, the

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United States has adopted the restrictive theory of foreign sovereign immunity. Under this principle of international law, foreign states are not immune from suits brought against them in their commercial capacities; implicit in this principle is the belief that foreign states are not entitled to avoid adjudication of their commercial liabilities by the mere assertion of sovereignty. At the same time, the United States has supported the judicial application of the act of state doctrine. A principal concern underlying that doctrine is that judicial review of a foreign state's public acts might interfere with or embarrass the conduct of foreign relations by the Executive. Both the doctrine of foreign sovereign immunity and the act of state doctrine implicate important foreign policy interests of the United States. This brief is filed in order to set forth the views of the United States as to the proper accommodation between those two doctrines in the circumstances of this and similar cases.

STATEMENT

On September 15, 1960, respondent Republic of Cuba nationalized, or "intervened,"[1] five private

[1] Although there are technical differences between nationalization and intervention, their practical consequences appear to be indistinguishable:

> Under "intervention" procedure the interventor is vested with complete possession and control of a business enterprise to the exclusion of the officers, directors, shareholders, partners or other persons who would otherwise manage and conduct it. Though intervention does not appear to effectuate a formal transfer of title from the former owners and managers to the governmental authorities, the end result is indistinguishable in practical effect from complete confiscation—for almost six years the former owners have been ousted without their consent from all the properties and excluded from any participation in the businesses. Their rights to any receipts and profits have been eliminated. No compensation has been provided. [*Palicio* v. *Brush*, 256 F. Supp. 481, 484 (S.D. N.Y.), affirmed without opinion, 375 F. 2d 1011 (C.A. 2), certiorari denied *sub nom. Brush* v. *Republic of Cuba*, 389 U.S. 830.]

Cuban cigar manufacturing companies[2] that had been engaged in the business of exporting tobacco products to the United States; their customers included several American importers, including petitioner, Alfred Dunhill of London, Inc.[3] Designees of the Cuban government (the "interventors") assumed possession and control of the businesses and assets of the intervened tobacco companies.

The tobacco companies' business operations were not immediately disturbed by the intervention. Petitioner and other importers continued their purchases of tobacco products after the companies came under the interventors' control, and "[s]hipments from Cuba to the importers continued until February, 1961, when relations between the importers and interventors deteriorated for various reasons" (J.A. 4a; 485 F. 2d at 1360–1361).[3a] During the time that normal business relations continued, the importers made payment to the

[2] Some of the tobacco companies had been organized as corporations, others as partnerships, but all or substantially all of the beneficial ownership interests in each had been held by Cuban nationals (the "prior owners"). (Except where otherwise noted, the facts set forth in this statement are taken from the opinions below.)

[3] Petitioner is a corporation organized under the laws of the State of Delaware (A. 8).

[3a] "J.A." refers to a joint appendix containing the opinions of the courts below; it was filed in connection with the petition for a writ of certiorari in No. 73–1287.

interventors on account of their liabilities for pre-intervention, and apparently also for some post-intervention, shipments of tobacco products. When importation ceased, the importers owed substantial amounts for post-intervention shipments, and these debts were left unpaid.

This case arose as one of several actions brought in the United States District Court for the Southern District of New York by the prior owners of the intervened companies (see note 2, *supra*) against petitioner and other importers for amounts allegedly due to them individually for post-intervention shipments of tobacco products. The intervened tobacco companies brought a separate action in the same district court, challenging the right of the prior owners to maintain their actions against petitioner and the other importers. In the course of that litigation, the interventors stipulated that the prior owners were entitled to payment for pre-intervention shipments.

The district court sustained the interventors' contentions with regard to the post-intervention shipments of tobacco products; the court determined that judicial inquiry into the validity of the intervention, at least insofar as the intervention affected rights of Cuban nationals in tangible property that had been held by the tobacco companies in Cuba, was precluded by the "act of state" doctrine and therefore that "the debts due for the price of cigars shipped after the interventions are owing to the interventors and not to the former owners * * *." *Palicio* v.

Brush, 256 F. Supp. 481, 489 (S.D. N.Y.).[4] The court of appeals affirmed, 375 F. 2d 1011 (C.A. 2), and this Court denied certiorari, 389 U.S. 830.

Following the conclusion of that litigation, respondents[5] intervened as plaintiffs in this and the other actions that had been brought against petitioner and the other importers by the prior owners; the prior owners apparently amended their complaint to seek recovery for the tobacco companies' pre-intervention shipments of tobacco products. The actions were consolidated for trial and tried without a jury. At trial, it developed that, pursuant to the interventors' previous stipulation, substantial amounts were owed the prior owners by the importers for pre-intervention shipments. Respondents thereupon disavowed the interventors' previous stipulation and asserted that they were entitled to recover or retain payments for pre-intervention as well as post-intervention shipments. They contended that the intervention had reached all property interests held by the tobacco companies on September 15, 1960, including intangible property

[4] The district court rejected the prior owners' contention that the so-called Hickenlooper Amendment to the Foreign Assistance Act of 1964, 78 Stat. 1013, 22 U.S.C. 2370(e)(2), barred application of the act of state doctrine. The court noted that the amendment applies only to acts by foreign sovereigns "in violation of the principles of international law," whereas the uncompensated nationalization of companies owned by Cuban nationals did not violate international law. 256 F. Supp. at 487.

[5] The respondents here are the Republic of Cuba and one of the interventors, Daniel Solano Pinera, who apparently now has been designated the single "interventor" for the five tobacco companies (No. 73–1287, Pet. 1–2).

such as the outstanding accounts receivable for prior shipments, and that, as in the earlier litigation between the interventors and the prior owners, judicial inquiry into the validity of the intervention was precluded by the act of state doctrine.

The district court determined initially that the importers were liable to respondents for the amounts owing on account of post-intervention shipments (J.A. 44a; 345 F. Supp. at 534). As to the pre-intervention shipments, the district court found that respondents in fact had already received payment from the importers (J.A. 46a; 345 F. Supp. at 536). But the court further held that, as against the prior owners, respondents had no legal entitlement to those payments (J.A. 46a–50a; 345 F. Supp. at 536–540), and that the importers had not discharged their liabilities to the prior owners by making payment to respondents (J.A. 50a–52a; 345 F. Supp. at 540–542). Accordingly, the district court determined that the importers were liable to the prior owners for the pre-intervention shipments (*ibid.*), but that the importers were entitled to restitution of the amounts received by respondents on account of those shipments (J.A. 53a–54a; 345 F. Supp. at 543–544). At trial, respondents' counsel represented that their clients would refuse to honor any obligation to make restitution; they argued that such a repudiation constituted an act of state that precluded entry of judgment against respondents (J.A. 54a; 345 F. Supp. at 544). The district court refused to give that effect to the repudiation (J.A. 55a–56a; 345 F. Supp. at 545–546), and entered judgment against respondents, in favor

of the importers, for a return of the money. Each of the importers, except petitioner, was able to use its recovery for restitution as an offset against its liability to respondents for post-intervention shipments. Petitioner's claim against respondents, however, exceeded respondents' claim against petitioner by some $55,000, and petitioner was therefore awarded an affirmative judgment against respondents in the amount of that excess (J.A. 74a; 345 F. Supp. at 564).

All parties appealed, and the court of appeals affirmed the district court in all respects but one. The court first analyzed the respective rights of respondents and the prior owners. The court determined, relying upon *Republic of Iraq* v. *First National City Bank,* 353 F. 2d 47 (C.A. 2), certiorari denied, 382 U.S. 1027, and *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.,* 392 F. 2d 706 (C.A. 5), certiorari denied, 393 U.S. 924, that pre-existing rights and duties between American debtors and foreign creditors are not affected by a foreign sovereign's seizure of the creditors' assets if that seizure is inconsistent with American laws and policies; that the Cuban intervention was inconsistent with our laws and policies; and, implicitly, that the pre-existing debts owed by the importers had run to the individual beneficial owners of the intervened tobacco companies and not to the companies themselves as separate legal entities (J.A. 11a–13a; 485 F. 2d at 1364–1365).[6] Thus

[6] Although its opinion is somewhat ambiguous, the court apparently determined not to give *res judicata* effect to the interventors' stipulation, in the earlier litigation, concerning the prior owners' entitlement to pre-intervention shipments (J.A. 10a–11a; 485 F. 2d at 1363–1364).

the court concluded that the prior owners, rather than respondents, were entitled to payment for the pre-intervention shipments of tobacco products to the importers.

The court of appeals then considered the prior owners' specific claims against the importers. The court rejected the importers' contention that they had discharged their debts to the prior owners for pre-intervention shipments by making payment to respondents in the ordinary course of business; the importers apparently did not deny that they had been aware that under domestic commercial law their debts were owing to the prior owners and not to respondents, and the court determined that the importers' payments to respondents had not been authorized or ratified by the prior owners (J.A. 18a–20a; 485 F. 2d at 1367–1368). The court therefore affirmed the judgments against the importers for the amount of their indebtedness to the prior owners as of the date of intervention.

Finally, the court turned to respondents' and the importers' claims against one another. The importers conceded their liability to respondents for the post-intervention shipments. Counsel for respondents, however, represented that their clients would not honor the obligation to return to the importers the payments made by the latter on account of the pre-intervention shipments. As they had done in the district court, counsel for respondents contended that even though respondents may have had no legal entitlement to those payments under applicable com-

mercial law, their refusal to honor any consequent obligation to return the moneys was itself an act of state that precluded judicial enforcement of the importers' right to restitution. The court determined that respondents' refusal to satisfy their quasi-contractual obligation to return the payment "was an act of state even though not embodied in a formal decree" (J.A. 26a; 485 F. 2d at 1371). However, relying upon *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, the court held that the act of state doctrine did not bar enforcement of "the importers' counterclaims * * * up to the limits of the respective claims asserted against them by [respondents]" (J.A. 30a; 485 F. 2d at 1373). The court therefore concluded (J.A. 31a; 485 F. 2d at 1374):

> [E]ach of the importers' counterclaims is allowed up to the limit of [respondents'] claims against it. However, the district court's decision, to the extent that it awards an affirmative judgment [of approximately $55,000] in favor of [petitioner] in excess of the claims against it, is reversed.[7]

Petitioner then petitioned this Court for review of the denial of an affirmative judgment against respondents (No. 73–1288). Respondents sought review of the determination that the prior owners, and not respondents, were entitled to payment on account of

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[7] The court determined that the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2), was inapplicable because petitioner's counterclaim for restitution was not a "claim of title or other right to property" within the meaning of that Amendment (J.A. 26a–27a; 485 F. 2d at 1371–1372).

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the pre-intervention shipments of tobacco products (No. 73–1287). The importers, including petitioner, filed a cross-petition, claiming that if respondents' contention in No. 73–1287 were sustained, the importers should be relieved of their liabilities to the prior owners (No. 73–1289). This Court granted only petitioner's separate petition in No. 73–1288. 416 U.S. 981.

INTRODUCTION AND SUMMARY OF ARGUMENT

In granting review of this case, and in restoring the case to the calendar last Term, this Court requested that the parties brief and argue three questions:

1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an "act of state"?

2. If so, is an exception to the act of state doctrine created, under *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's co-defendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?

3. Whether this Court's holding in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, should be reconsidered.

In framing those questions, the Court manifested an intention of focusing upon the relationship of the act of state doctrine to the representation by counsel that respondents would refuse to honor any quasi-contractual obligation to make restitution to petitioner. Respondents now seek to avoid this inquiry by contesting the existence of any such obligation. They contend, contrary to the holdings of the courts below, that on the basis of the intervention they had a legal entitlement to receive and retain payment for the pre-intervention shipments, to the exclusion of any rights of the prior owners (Resp. Br. on Reargument, pp. 1–8). We take no position on the merits of this contention. We make two observations concerning it, however. First, since the logic of respondents' contention would require dismissal of petitioner's, and the other importers', counterclaims in their entirety, that contention does not support the judgment below and therefore need not be considered by the Court, if indeed the Court has jurisdiction at all to consider such a contention by a respondent. See *United States* v. *ITT Continental Baking Co.,* 420 U.S. 223, 226–227, n. 2. See generally Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?,* 87 Harv. L. Rev. 763 (1974).[8] Moreover, consideration of that contention would appear to require consideration as well of the possible *res judicata* effect of the interventors' earlier stipulation that the prior owners were entitled to payment for the pre-intervention shipments (see J.A. 10a–11a; 485 F. 2d at 1363–1364).

Second, respondents' contention that they were legally entitled under the intervention to retain peti-

[8] The substance of respondents' contention appears to be subsumed under the third question presented in their separate petition for a writ of certiorari in this case (No. 73–1287). Neither that petition nor the importers' cross-petition (No. 73–1289) has been acted upon by the Court.

tioner's payments leads them to assert that "it is the intervention which is the act of state, not the repudiation of a commercial debt" (Resp. Br. on Reargument, p. 8); but this characterization of the pertinent act of state represents an abandonment of the litigating position upon which the court of appeals rested its decision to deny an affirmative judgment to petitioner. Respondents' act of state defense in the court of appeals was "grounded on the fact that when the importers demanded return of the payments[, respondents] ignored the demands" (J.A. 22a; 485 F. 2d at 1369), and in this Court, until briefing on reargument, respondents consistently maintained that the act of state in question was "the repudiation of a commercial debt" (No. 73-1287, Pet. 7; see also Br. in Op. 3 and Resp. Br. 17-18). Respondents now appear to suggest that their refusal to make restitution to the importers, far from being a repudiation of a commercial debt, was merely the assertion of a claim of right, based upon the intervention, to retain the moneys pending final adjudication and was not intended to preclude entry of an adverse judgment. If so, the court of appeals plainly erred in relying upon that refusal as a basis for applying the act of state doctrine to deny affirmative judgment to petitioner.

For purposes of analysis here, however, we assume that respondents in fact have repudiated an obligation to make restitution to the importers.[9] As *amicus*

[9] For the reasons set forth below (pp. 27-35, *infra*), the repudiation of a commercial obligation, whether announced by formal decree or merely by counsel in the course of litigation, is not a public act of state. But if this Court concludes to the contrary that such a repudiation can be a public act of state, in determining whether the repudiation here was such an act the Court would have to consider whether respondent Republic of Cuba actually authorized counsel to represent the fact of repudiation. If that representation was unauthorized, then of course there has been no repudiation and *a fortiori* no act of state. The question of authority is a factual one that, if necessary, presumably should be tried in the first instance by the district court. But for purposes of analysis, we assume that counsel's representation was authorized. See Resp. Br. 12.

curiae, the United States takes as fixed the legal rights and duties of the respective parties determined by the court of appeals, including respondents' quasi-contractual obligation to make restitution to the importers, except insofar as those rights and duties may be affected by respondents' repudiation. In this brief, we discuss only the legal effect that must be given to such a repudiation by a state or federal court.

We believe that the proper accommodation between the doctrine of sovereign immunity and the act of state doctrine requires that no legal effect be given to such a repudiation in the circumstances of this and similar cases.

Under the modern restrictive theory of foreign sovereign immunity, adhered to by the United States and most foreign industrial states in the conduct of foreign relations, immunity is claimed or granted only with respect to causes of action arising out of a state's governmental acts and not with respect to those arising out of its commercial or private acts. The practical foundation of this theory, which has been adopted and applied by the lower federal and state courts, is the consideration that "the widespread

and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." 26 Dept. State Bull. 984, 985 (1952).

Respondents in this case would not have been entitled to sovereign immunity even had they claimed it. Petitioner's cause of action for restitution is based upon acts committed by respondents in their commercial capacities as tobacco merchants, and under the restrictive theory of sovereign immunity respondents were not immune from suit on that cause of action.

Respondents' contention here—that their naked repudiation of any obligation to make restitution to petitioner is an "act of state" that bars entry of judgment in favor of petitioner—is nothing more than a bald claim that a foreign state may bar judicial enforcement of its commercial liabilities by mere assertion of its sovereignty in the form of a repudiation of those liabilities. It is nothing more, in other words, than a claim of sovereign immunity in disguise. This effort to resurrect the doctrine of absolute foreign sovereign immunity under cover of the act of state doctrine should be rejected.

Moreover, respondents' repudiation is not the kind of state act that traditionally has been accorded protection under the act of state doctrine. First, that repudiation was not a "public act," *i.e.,* it was not a "governmental act in which the sovereign's interest qua sovereign is involved." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 445, n. 3 (dissenting opinion

of Mr. Justice White). To the contrary, the repudiation was a private act arising out of purely commercial dealings and as such was not entitled to the judicial deference accorded public acts. See *Victory Transport, Inc.* v. *Comisaria General,* 336 F. 2d 354 (C.A. 2), certiorari denied, 381 U.S. 934. Second, respondents' repudiation did not satisfy the territorial prerequisite to application of the act of state doctrine. That doctrine applies only where the predominant jurisdictional contacts of the foreign state's act are outside the United States. In this case, the predominant jurisdictional contacts are with the United States.

For these reasons, we believe that it is not necessary for this Court to reach the second and third questions it has framed in this case: the Court need not consider whether this case falls within an exception to the act of state doctrine created under *First National City Bank* v. *Banco Nacional de Cuba, supra,* or whether the act of state doctrine as formulated and applied in *Banco Nacional de Cuba* v. *Sabbatino, supra,* should be reconsidered, for the reason that the act of state doctrine does not apply here at all. But if it is determined, to the contrary, that the act of state doctrine in its traditional formulation would require judicial deference to respondents' repudiation of their commercial obligation, we believe that that doctrine should be reconsidered and narrowed in light of modern restrictive notions of foreign sovereign immunity.

The judicial concerns that have given rise to the act of state doctrine would not be implicated by a refusal to give legal effect to respondents' repudiation of their

commercial obligation in this case. First, it is clear that manageable legal standards exist for the adjudication of the obligations arising from a foreign state's commercial acts; the difficulty of selecting manageable legal standards against which to measure a repudiation of such obligations therefore does not arise, for such standards inhere in the law governing the underlying commercial transaction. Second, a court's entry of judgment against a foreign state on the basis of a commercial obligation would not embarrass the United States in the conduct of its foreign relations, even if the foreign state has repudiated that obligation. Such a judgment would rest, at bottom, upon a determination that the commercial activities of a foreign state are subject to the same law that applies to commercial acts of private parties: the adjudication of liability would be based upon the law applicable to commercial transactions, and the judicial refusal to give effect to a foreign state's repudiation of that liability would be based upon the principle that a foreign state's commercial activities are governed by that law. That is precisely the principle to which the United States has adhered in the conduct of its foreign relations by subscribing to the restrictive theory of sovereign immunity.

Finally, there are strong affirmative reasons for refusing to afford the protection of the act of state doctrine to a foreign state's mere repudiation of its commercial obligations. With the growing participation of foreign governments and their instrumentalities in international trade, there has been a significant

increase in the commercial interaction between American businesses and state-owned foreign enterprises. It is in the interest of the United States that such commercial interaction be subject to the rule of law. The United States also has a more specific interest in being able to enforce its own laws against foreign-state enterprises engaged in commercial activities having substantial contacts with this country. These interests can be safeguarded only by judicial refusal to apply the act of state doctrine either to the purely commercial, nongovernmental acts of a foreign state or to a foreign state's repudiation of obligations arising from such acts.

ARGUMENT

A FOREIGN STATE'S REPUDIATION OF A COMMERCIAL OBLIGATION DOES NOT PRECLUDE ENTRY OF JUDGMENT IN FAVOR OF THE PRIVATE CLAIMANT

In our view, this case is governed by the following argument—

> Under modern precepts of sovereign immunity, a foreign state may not assert mere sovereignty as a preclusive defense against a claim or counterclaim relating to a commercial obligation.
>
> But to defer to a foreign state's sovereignty by refusing to enter judgment against it in an action on a commercial obligation merely because of that state's repudiation of the obligation would be to permit the state to assert mere sovereignty as a preclusive defense.
>
> Therefore, a foreign state's repudiation of a commercial obligation does not preclude entry of judgment in favor of the private claimant.

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In part A, *infra*, we elaborate upon this argument. In part B, *infra*, we discuss the relationship that that argument bears to the act of state doctrine in this case.

A. SINCE A FOREIGN STATE MAY NOT ASSERT SOVEREIGN IMMUNITY AS A DEFENSE TO A CLAIM RELATING TO A COMMERCIAL OBLIGATION, A STATE MAY NOT PRECLUDE ADJUDICATION OF SUCH A CLAIM ON ITS MERITS MERELY BY REPUDIATING ITS OBLIGATION

1. This Court has long recognized that a commercial enterprise owned or controlled by a sovereign is not immune from suit on a cause of action arising out of its business dealings. As Mr. Chief Justice Marshall noted in his opinion for the Court in *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Thus in *Sloan Shipyards* v. *U.S. Fleet Corp.*, 258 U.S. 549, the Court held that a corporation all of whose stock was owned by the United States, and which operated as a federal agency, could be sued upon its contracts and for its torts. This rule also has long been applied to the separate commercial enterprises owned or controlled by foreign states. See, *e.g.*, *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. 2d 199 (S.D. N.Y.); *The Ural*, 40 F. Supp. 258 (D. Mass.); *The Beaton Park*, 65 F. Supp. 211 (W.D. Wash.); *Plesch* v. *Banque Nationale de la Republique D'Haiti*, 273 App. Div. 224, 77 N.Y.S. 2d 43.

Prior to 1952, a contrary rule applied in the United States with respect to the commercial activities conducted directly by foreign states themselves, rather than by their wholly owned commercial enterprises. This Court had accorded foreign states in their commercial capacities the same absolute immunity from suit that they enjoyed in their governmental capacities. See *Guaranty Trust Co.* v. *United States*, 304 U.S. 126; *Berizzi Bros. Co.* v. *Steamship Pesaro*, 271 U.S. 562. But in 1952, the Department of State, following the lead of most civil law countries, adopted the international legal principle that foreign states are not entitled to immunity from suits brought against them in their commercial capacities. See 26 Dept. State Bull. 984 (1952) (the so-called Tate Letter).[10] The Department of State determined that in

[10] For recent foreign decisions applying that principle, see, *e.g.*:

Austria: *Holoubek* v. *United States*, 40 Int'l L. Rep. 73 (Sup. Ct., 1961).

Belgium: *Socobel* v. *Greek State*, 18 Int'l L. Rep. 3 (Trib. Civ. Brussels 1951).

Canada: *Penthouse Studios, Inc.* v. *Republic of Venezuela*, 8 D.L.R. 3d 686 (Ct. App. Quebec, 1969).

England: *Thai-Europe Tapioca Services, Ltd.* v. *The Government of Pakistan* (court of Appeal) (see *The Times* (London), July 16, 1975). *The Phillippine Admiral* (Privy Council, November 6, 1975) (see *The Times* (London), November 11, 1975, p. 14).

Egypt: *Federated People's Republic of Yougoslavia* v. *Kafr*

acting upon requests by foreign states for sovereign immunity, and in determining whether to request the Department of Justice to suggest that defense in United States courts, it would adhere to the "restrictive theory" of foreign sovereign immunity, under which immunity is granted only with respect to causes of action arising out of a foreign state's governmental acts (*jure imperii*) and not with respect to those arising out of its commercial or proprietary acts (*jure gestionis* (*id.* at 984–985):

> The Department of State has for some time had under consideration the question whether the practice of the Government in granting im-

El-Zayat Cotton Co., Ltd., 18 Int'l L. Rep. 225 (Civ. Trib. Alexandria 1951).

France: *Administration des Chemins de Fer Iraniens* v. *Societe Levant Express Transport*, 73 Rev. Gen. Dr. Int'l Pub. 883 (Sup. Ct. 1969).

Germany: *Claim Against The Empire of Iran Case*, 45 Int'l L. Rep. 57 (Fed. Const. Ct. 1963).

Greece: *Papaevangelou* v. *United States Government*, (Athens Ct. First Inst., April 23, 1960).

Hong Kong: *Midland Investment Co., Ltd.* v. *The Bank of Communications*, 40 H.K.L. Rep. 42, 23 Int'l L. Rep. 234 (S. Ct. 1956).

Italy: *United States* v. *I.R.S.A. Co., Ltd.*, 86 Il Foro Ital. 1405 (Sup. Ct., *en banc*, March 13, 1963).

Jordan: *Nashashibi* v. *The Consul-General of France*, 26 Int'l L. Rep. 190 (Sup. Ct. 1958).

Pakistan: *Gammon-Layton Co., Ltd.* v. *United States of America*, (High Court of West Pakistan, Karachi Bench, January 2, 1965).

Philippines: *Carried Lumber Co.* v. *The United States of America* (Ct. App. Manila, Sept. 24, 1974).

Yugoslavia: *Zarko* v. *Office of International Trade Fairs, U.S. Department of Commerce* (Dist. Ct. Zagreb, June 10, 1966).

munity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. * * *

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

* * * * *

[W]ith the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading

countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

This Court has not had occasion to consider the distinction articulated in the Tate Letter. But *cf. Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35. The lower federal courts and the state courts, however, now generally apply the restrictive theory in adjudicating foreign states' claims to sovereign immunity. See, *e.g.*, *Victory Transport, Inc.* v. *Comisaria General*, 336 F. 2d 354 (C.A. 2), certiorari denied, 381 U.S. 934; *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F. 2d 103 (C.A. 2), certiorari denied, 385 U.S. 931; *Premier Steamship Co.* v. *Embassy of Algeria*, 336 F. Supp. 507 (S.D. N.Y.) *Ocean Transport Co.* v. *Government of Republic of Ivory Coast*, 269 F. Supp. 703 (E.D. La.); *ADM Milling Co.* v. *Republic of Bolivia*, Civil Action No. 75–946, decided August 8, 1975 (D.D.C.); *Et Ve Balik Kurumu* v. *B.N.S. International Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S. 2d 971; *Harris & Co. Advertising, Inc.* v. *Republic of Cuba*, 127 So. 2d 687 (Fla. Ct. App.). That theory is now generally accepted as the settled law of foreign sovereign immunity in this nation. See ALI, *Restatement (Second), Foreign Relations Law of the United States* § 69 (1965).[11]

As the Tate Letter indicates, the restrictive theory rests, at bottom, upon the consideration "that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." That consideration is, if anything, considerably more forceful today than it was in 1952, for the intervening years have seen a sharp increase in the volume of trade conducted between American businesses and foreign states, or their instrumentalities, acting in a commercial capacity. Cf. *International Economic Report of the President* 56 (1975). That consideration, in our view, considerably outweighs the traditional rationale for absolute foreign

[11] The Executive Branch has submitted to the Congress proposed legislation that would codify this modern development of sovereign immunity practice as it applies to foreign governments involved in litigation in federal and state courts. 121 Cong. Rec. S19,119 (daily ed. November 4, 1975). See also S. 566, 93d Cong., 1st Sess. (1973); H.R. 3493, 93d Cong., 1st Sess. (1973).

sovereign immunity, *i.e.*, "the desirability of avoiding adjudication which might affront the sovereignty of a foreign nation and thus embarrass the executive branch in its conduct of foreign relations." Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1607–1608 (1962).

This is so for two reasons. First, the adjudication of a commercial claim against a foreign state on the merits does not "affront the sovereignty of a foreign nation" because sovereignty as such is not implicated in such an adjudication; the foreign state makes its appearance in the marketplace as a merchant, not as a sovereign, and it is as a merchant that the foreign state is adjudged liable on its commercial obligations. Second, since the Department of State has officially adopted the restrictive theory of foreign sovereign immunity, and since that theory is widely followed in other nations (see note 10, *supra*), adjudications in conformity with that position would further, rather than hinder, the foreign policy objectives of the Executive. Accordingly, this Court should approve those lower court decisions that have adopted and correctly applied the restrictive theory of sovereign immunity. Parties with claims against foreign states arising out of commercial activities should not be denied their day in court by outmoded notions of absolute immunity which arose in the era of personal sovereigns.

2. Respondents have not asserted sovereign immunity as a defense to petitioner's claim for restitution, and it is clear that they would not have been

entitled to such a defense even had they asserted it. Petitioner's cause of action is based upon acts committed by respondents in their commercial capacities as sellers of tobacco products: petitioner had paid respondents, in their roles as tobacco merchants, amounts in excess of petitioner's actual indebtedness for tobacco purchases; petitioner's counterclaim simply seeks recovery of its excess payments.

Since petitioner's claim arises solely out of respondents' nongovernmental, commercial dealings, under the modern restrictive theory of foreign sovereign immunity even respondent Republic of Cuba would not have been immune from a suit brought by petitioner as a party plaintiff. See, *e.g.*, *Petrol Shipping Corp.* v. *Kingdom of Greece, supra. A fortiori,* respondent Republic of Cuba was not entitled to bar petitioner's counterclaim on grounds of sovereign immunity. *National Bank* v. *Republic of China,* 348 U.S. 356. This is true, moreover, even though the amount of petitioner's counterclaim exceeded the amount of respondents' claim against petitioner. See, *e.g.*, *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen,* 43 F. 2d 705 (C.A. 2); *Kingdom of Norway* v. *Federal Sugar Refining Co.,* 286 Fed. 188 (S.D. N.Y.); *Mexico* v. *Rask,* 118 Cal. App. 21, 4 P. 2d 981; *Et Ve Balik Kurumu* v. *B.N.S. International Sales Corp., supra.* Furthermore, even if the restrictive theory of sovereign immunity were for some reason held inapplicable here, respondent interventor, the party who actually received and retained petitioner's payments, would nevertheless be subject to suit by petitioner for

restitution, for as the mere representative of a separate commercial enterprise owned by a foreign state, the interventor would not in any event be clothed with whatever immunity the foreign state itself might retain. See, *e.g., Sloan Shipyards* v. *U.S. Fleet Corp., supra; United States* v. *Deutsches Kalisyndikat Gesellschaft, supra.* Thus, under any theory, respondents could not have avoided the obligation to make restitution merely by asserting sovereign immunity.

3. Respondents' contention here—that their naked repudiation of any obligation to make restitution to petitioner is an "act of state" that bars entry of judgment in favor of petitioner—is nothing more than a bald claim that a foreign state may bar judicial enforcement of its commercial liabilities by mere *ipse dixit, i.e.,* by mere assertion of its sovereignty in the form of a repudiation of those liabilities. It is nothing more, in other words, than a claim of sovereign immunity in disguise. This effort to resurrect the doctrine of absolute foreign sovereign immunity under cover of the act of state doctrine [12] will not do.

The purpose of the modern restrictive theory of sovereign immunity is to subject foreign states, just like private litigants, to adjudications of the liabilities they incur in the course of their commercial dealings, when they otherwise have come within the jurisdiction of the adjudicating tribunal. That purpose would be

[12] Indeed, on behalf of the respondent interventor it is an effort to extend sovereign immunity beyond its furthest historic reach. See *Sloan Shipyards* v. *U.S. Fleet Corp., supra; United States* v. *Deutsches Kalisyndikat Gesellschaft, supra.*

completely frustrated by permitting a foreign state to preclude judgment in favor of a commercial creditor by the simple, if unorthodox, expedient of announcing its determination to refuse payment. If the restrictive theory of sovereign immunity is to have any meaning and force, as we believe it must, respondents' contention here must be rejected.

Moreover, this conclusion holds, as we now show, without regard to whether respondents' repudiation of their debt to petitioner is or is not properly characterized as an "act of state."

B. TO THE EXTENT THAT THE ACT OF STATE DOCTRINE REQUIRES JUDICIAL DEFERENCE TO A FOREIGN STATE'S REPUDIATION OF A COMMERCIAL OBLIGATION, IT SHOULD BE RECONSIDERED IN LIGHT OF THE RESTRICTED SCOPE OF THE MODERN DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

1. The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 401. The doctrine applies to "acts done within their own States, in the exercise of governmental authority * * *." *Underhill* v. *Hernandez,* 168 U.S. 250, 252. Thus in its traditional formulation, the act of state doctrine may be invoked only if two necessary conditions are met: the alleged act of state must be a "governmental act in which the sovereign's interest qua sovereign is involved" (*Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 445, n. 3 (dissenting opinion of Mr. Justice White)), and it must satisfy a requirement relating to territoriality.

In our view, the alleged act of state here—respondents' repudiation of a commercial obligation to a person beyond Cuba's territorial ~~sovereignty~~ sovereignty—meets neither of those two conditions.

a. In repudiating a quasi-contractual obligation arising out of their purely commercial dealings, respondents do not appear to have been performing a "public act," *i.e.*, a "governmental act in which the sovereign's interest qua sovereign is involved." To the contrary, respondents' repudiation is akin to, if not in fact analytically indistinguishable from, the repudiation of a contractual obligation. But the act of state doctrine does not immunize from judicial scrutiny a foreign state's failure or refusal to discharge its commercial obligations; the doctrine does not protect a foreign state's mere commercial or private acts.

This explicitly is the rule in England, where the courts, in formulating the act of state doctrine, have expressly distinguished between a foreign state's governmental acts and its private or commercial transactions. For example, in the landmark case of *Duke of Brunswick* v. *King of Hanover,* [1848–50] 2 H.L.C. 1, the House of Lords limited the scope of the act of state doctrine to acts constituting an "exercise of public authority" (*id.* at 17), in contrast to acts in the nature of "a private transaction"(*id.* at 21).

This Court has not heretofore had occasion to consider this distinction between public and commercial acts. The act of state cases this Court has decided all appear to have involved takings or other acts that were found to represent the exercise of sovereign

authority. See, *e.g., Shapleigh* v. *Mier,* 299 U.S. 468; *Ricaud* v. *American Metal Co.,* 246 U.S. 304; *Oetjen* v. *Central Leather Co.,* 246 U.S. 297. But the Second Circuit did apply that distinction in *Victory Transport, Inc.* v. *Comisaria General, supra.* In that case, an instrumentality of the Spanish government was sued by the owner of a ship to compel arbitration of a claim for damages to the ship's hull sustained in Spanish ports. The Spanish government had voyage-chartered the ship to carry a cargo of wheat from the United States to "safe" ports in Spain. The damages were sustained, according to the shipowner, because the ports were not safe. The Spanish government, claiming that it had designated the port as "safe," resisted the shipowner's petition on the ground that the act of state doctrine prohibited inquiry into the correctness of that designation. The court of appeals rejected that defense, stating (336 F. 2d at 363):

> [T]he act of state doctrine applies only to the "public acts" of a foreign sovereign, Restatement Foreign Relations Law of U.S. § 41c (Proposed Official Draft 1962), and we cannot see that designating ports as safe for the S.S. Hudson was a public act of the Spanish Government. The designation of safe ports for the discharge of cargo is an act frequently performed by merchants voyage-chartering a cargo ship. * * * It can hardly be termed an act of state simply because a state instrumentality happened to be the voyage-charterer.

The decision in *Victory Transport* was correct. The designation of safe ports as a part of a chartering

agreement, entered into for the purpose of transporting wheat, was a purely commercial act. The foreign state's claim—that the act of state doctrine precluded inquiry into the propriety of its designation—was simply an effort "to enter the sanctuary of sovereign immunity through the side door * * *" (336 F. 2d at 362). In rejecting that claim, the Second Circuit correctly determined that a voyage-charterer's designation of a safe port is essentially commercial rather than governmental.

The same analysis is appropriate here. Respondents' refusal to repay moneys mistakenly paid to them by petitioner, in the course of their tobacco transactions, constituted the breach of a quasi-contractual obligation to make restitution. Respondents' claim—that their repudiation of any obligation is an act of state that bars judicial inquiry into the existence of an obligation—is simply an effort to assert sovereignty as a bar to judgment. But a tobacco merchant's repudiation of an obligation to make restitution, like a voyage-charterer's designation of a safe port, is not an act that is sovereign in nature.[13] Accordingly, since the

[13] "In considering what is commercial activity, the standard to be applied is that of the state exercising jurisdiction." ALI, *Restatement (Second), Foreign Relations Law of the United States, supra*, § 69 at 209. Thus a naked claim by respondents that their repudiation is noncommercial is insufficient to establish that proposition. Moreover, at least for purposes of the doctrine of foreign sovereign immunity, the determination of whether an act is public or commercial depends on the nature of the act, not its purpose. For example, a contract by a foreign state to purchase clothing is a commercial act, even though the foreign state's purpose may be to clothe its army. See *Et Ve Balik Kurumu* v. *B.N.S. International Sales Corp., supra.*

alleged act of state involved here, the repudiation, is a private act, arising out of commercial dealings, and not a "governmental act in which the sovereign's interest qua sovereign is involved," the act of state doctrine by its own terms does not apply.

b. Nor does respondents' repudiation of their obligation to make restitution to petitioner satisfy the territorial prerequisite to application of the act of state doctrine. That requirement has frequently been alluded to in the decisions of this Court, but it has rarely been closely defined. The act of state doctrine is generally described as applying to acts committed by a foreign state within its own territory. See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 401; *Underhill* v. *Hernandez, supra,* 168 U.S. at 252. A close examination of the cases and of the purpose and operation of that doctrine, however, reveals that it is not the locus of the state act but rather the predominant jurisdictional contacts of the act, or of the transactions to which it relates, that determine the availability of an act of state defense.

The courts of this country apply the act of state doctrine only where the predominant jurisdictional contacts are outside the United States, *i.e.*, where under commonly accepted conflict principles, the substantive law of the foreign state controls the adjudication of the merits of the dispute. See ALI, *Restatement (Second), Foreign Relations Law of the United States, supra,* § 41 at 131, comment j; see also *id.*, §§ 18, 19, 43. That is the central territorial limitation on the applicability of the act of state doctrine.

That limitation serves to restrict the applicability of the act of state doctrine to cases where that doctrine serves its principal purpose of preventing American courts from examining "the acts of a foreign sovereign * * * in order to determine whether or not those acts were legal under the municipal law of the foreign state." *Banco de España* v. *Federal Reserve Bank of New York*, 114 F. 2d 438, 443 (C.A. 2). See also *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 249 (C.A. 2) certiorari denied, 332 U.S. 772.

Where the predominant jurisdictional contacts of a transaction are with a foreign state, so that the law of the foreign state controls the rights and duties arising from the transaction (see, *e.g.*, *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917), the act of state doctrine obviates the embarrassment to foreign relations that might result from a judicial determination that a foreign state's public acts are inconsistent with the foreign state's own laws. See *Blad* v. *Bamfield*, 36 Eng. Rep. 992; *Duke of Brunswick* v. *King of Hanover*, *supra*.

In practice, therefore, the act of state doctrine applies principally to two types of public acts that have their predominant jurisdictional contacts with the foreign state. First, the doctrine applies where the act in question is an implementation, solely within the foreign state. Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347. In such situations, the statute or decree itself ordinarily would provide the rule of

the foreign state's territory, of a statute or decree of,

law applicable to the case;[13a] the act of state doctrine "precludes a challenge to the validity of foreign law on the ordinary conflict of laws ground of repugnancy to the public policy of the forum." *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 446 (dissenting opinion of Mr. Justice White).

Second, the act of state doctrine has been applied to other public acts that may not be governed or explicitly authorized by statute or decree but that do have predominant jurisdictional contacts with the foreign state. For example, a claim that an American citizen was falsely imprisoned by a foreign state within its territory ordinarily would require adjudication of the lawfulness of the imprisonment under the foreign state's own law; that is a matter into which our courts do not inquire under the act of state doctrine. *Underhill* v. *Hernandez*, *supra*.

The concerns reflected by the application of the act of state doctrine in the two sets of circumstances just discussed are not implicated, however, where, because the predominant jurisdictional contacts of the transaction affected by the act of state are with the United States, American law controls the adjudication of the merits of the dispute. By definition, the rules of law of a foreign state are not applicable in the latter case.

[13a] Where the statute or decree effectuates a taking of property within the foreign state's territory, American courts may examine the validity of that taking under both "the principles of international law" (22 U.S.C. 2370(e)(2)) and any "treaty or other unambiguous agreement regarding controlling legal principles." *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 428.

Similarly, where American law controls there is no danger of adjudicating the foreign state's act invalid under its own laws.

In the instant case, the district court correctly determined that the predominant contacts of the transactions underlying petitioner's claim for restitution were with the United States rather than with Cuba and therefore that, under applicable conflict principles, that claim was controlled not by Cuban but by American law (J.A. 55a, 345 F. Supp. at 545):

> [Petitioner's] claims are obligations arising out of unjust enrichment and are imposed by law * * *.
>
> * * *
>
> That these obligations arose out of the mistaken payment of debts due and owing in the United States by importers located here has already been made clear. All payments by the importers were made by check drawn against their accounts in banks in the United States. Most of the payments were made to collecting banks in the United States acting on behalf of the interventors. The funds from such checks as were sent directly to Cuba, could only be realized upon when collected by from the drawee banks in the United States.

Similarly, the predominant jurisdictional contacts of respondents' repudiation of their obligation to make restitution are with the United States. Respondents' repudiation was intended to operate not within Cuba's territorial sovereignty but within the United States, by "confiscating" a United States national's cause of action that was subject to adjudication in American

courts under American law.[14] Respondents' act had the sole purpose of depriving American courts of jurisdiction over a lawsuit otherwise properly before them involving issues of American law. As such, that act exceeded the traditional territorial limitation circumscribing the act of state doctrine. Under commonly accepted conflict principles, this act—a repudiation of an obligation incurred under American law in a transaction having predominant contacts with the United States—is subject to adjudication under American, not Cuban law. Cf. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (C.A. 2).[15] Foreign state acts are not immunized from judicial scrutiny in such cases. See *United States* v. *Sisal Sales Corp.,* 274 U.S. 268.

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[14] Moreover, even if respondents' repudiation were characterized as a confiscation of actual moneys in Cuba to which petitioner had a claim, as a confiscation of "property" it would appear to be outside the protection of the act of state doctrine by virtue of the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 78 Stat. 1013, 22 U.S.C. 2370(e)(2).

[15] Even if the Court should decide not to make a choice of law on the basis of predominant jurisdictional contacts, the same result would be reached under conflict of law decisions by this Court in other cases relating to intangible property. Thus, the Court has held that a court may apply the law of the forum "where [both] the debtor and creditor are within the [court's] jurisdiction." *Standard Oil Co.* v. *New Jersey,* 341 U.S. 428, 439–440. See also *Cities Service Co.* v. *McGrath,* 342 U.S. 330, 334; *Curry* v. *McCanless,* 307 U.S. 357, 365–366. Cf. *Texas* v. *New Jersey,* 379 U.S. 674. In the present case, petitioner is domiciled in the United States and respondents have brought themselves within the jurisdiction of this nation's courts. Since both parties to the obligation are within the jurisdiction of an American court in this case, American law can be applied to determine the rights and liabilities arising from obligations between these parties.

2. But to the extent that, contrary to the analysis set forth above, the act of state doctrine is construed as precluding inquiry into a foreign state's repudiation of a purely commercial debt in the circumstances of this case, that doctrine should be reconsidered and abrogated.

a. The act of state doctrine has arisen principally from two interrelated, and substantial, judicial concerns: the possible absence of any manageable legal standards by which the validity of a foreign state's act may be measured, and the possibility that review of the validity of a foreign state's acts might interfere with or embarrass the conduct of foreign relations by the political branches. See *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 423; *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 765–768 (plurality opinion of Mr. Justice Rehnquist), 788 (dissenting opinion of Mr. Justice Brennan). Neither of these concerns would be implicated by a refusal to give legal effect to respondents' repudiation of their quasi-contractual obligation in this case.

i. Manageable legal standards exist for the adjudication of the liabilities arising from a foreign state's commercial acts. International commercial grievances between private parties have long been recognized as appropriate for judicial resolution, for there are developed systems of laws establishing identifiable norms against which commercial conduct can be measured. The rights and duties arising out of commercial relations are normally governed by a particular state's

law and, absent a specific choice of law provision in an agreement, commonly accepted conflict principles determine which state's law governs. See *Pritchard* v. *Norton,* 106 U.S. 124; ALI, *Restatement (Second), Conflict of Laws* § 188 (1971); Uniform Commercial Code § 1–105 (1965). See generally Ehrenzweig, *Contracts in the Conflict of Laws,* 59 Colum. L. Rev. 973, 1171 (1959). The applicability of these conflict principles, and of the domestic law of the state whose law governs under those principles, is not affected by the fact that one of the parties to the lawsuit is a foreign state. A foreign state's liabilities arising from its commercial acts may be adjudicated under the same manageable legal standards that apply to the commercial conduct of private persons. As the Permanent Court of International Justice observed in the case of *Serbian and Brazilian Loans,* P.C.I.J., Ser. A, No. 20/21, p. 41 (1929):

> Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of conflict of laws.[16]

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[16] Although contracts between a state and an alien are usually based on the municipal law of some country, the breach of such contracts may also violate international law. See *German Interest In Polish Upper Silesia,* P.C.I.J., Ser. A, No. 6, p. 22 (1925); ALI, *Restatement (Second), Foreign Relations Law of the United States, supra,* § 193(1). Moreover, in modern commercial transactions, the parties to a contract may specify a body of trans-na-

Cf. *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134–135, n. 2. The fact that commercial acts were performed by a foreign state rather than by a private person does not operate to confer a protected status upon such acts under those standards. See *Victory Transport, Inc.* v. *Comisaria General, supra.* See generally, Mann, *State Contracts and State Responsibility,* 54 Am. J. Int'l L. 572 (1960). In this respect, therefore, commercial claims against foreign states or their enterprises are justiciable. Cf. *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 785–790 (dissenting opinion of Mr. Justice Brennan).[17]

In short, the commercial liabilities of a foreign state, like those of any private person, may be fixed and determined by a court by reference to a known body of law applicable to commercial enterprises. A foreign state's mere repudiation of such liabilities implicates no other body of law; such a repudiation represents nothing more than adherence to the course of action that gave rise to the commercial liability in the first place. The difficulty of selecting manageable legal standards against which to measure such a repudia-

tional law (*e.g.*, the law of the European Community) as governing their contract.

[17] Moreover, petitioner's claim for restitution in this case is based upon the principle of unjust enrichment, which also is recognized by customary international law. See, *e.g.*, *North Sea Continental Shelf Cases,* [1969] I.C.J. Rep. 3, 136 (opinion of Ammoun, J.). See generally O'Connell, *The Law of State Succession* 103 (1956); Meron, *Repudiation of Ultra Vires State Contracts and the International Responsibility of States,* 6 Int'l & Comp. L. Q. 273 (1957); Friedmann, *The Uses of "General Principles" in the Development of International Law,* 57 Am. J. Int'l L. 279, 295 (1963).

tion therefore does not arise, for such standards inhere in the commercial law governing the underlying commercial transaction. The adjudication of the existence of liability adjudicates the invalidity, or legal ineffectiveness, of the repudiation as well. See *Republic of Peru v. Dreyfus Bros. & Co.,* [1888] L.R. 38 Ch. 348; *Republic of Peru* v. *Peruvian Guano Co.,* [1887] L.R. 36 Ch. 489.

ii. A court's entry of judgment against a foreign state on the basis of a commercial obligation would not embarrass the United States in the conduct of its foreign relations, even if the foreign state has repudiated that obligation. Such a judgment would rest, at bottom, upon a determination that the commercial activities of a foreign state are subject to the same law that applies to commercial acts of private parties: the adjudication of liability would be based upon the law applicable to commercial transactions, and the judicial refusal to give effect to a foreign state's repudiation of that liability would be based upon the principle that a foreign state's commercial activities are in fact governable, and governed, by that law. That is precisely the principle to which the United States has adhered in the conduct of its foreign relations by subscribing to the modern restrictive theory of sovereign immunity.

The United States has, since 1952, adhered to the rule of international law that foreign states are not immune from suits brought against them in their commercial capacities for enforcement of their commercial liabilities. Implicit in this position is the Executive's determination that the adjudication of a

foreign state's commercial acts and liabilities on the merits, and the subjection of the foreign state to judgment on the basis of that adjudication, does not embarrass or interfere with the conduct of our international relations.[18] Moreover, we have been explicitly advised by the Department of State that the foreign policy interests of the United States do not require application of the act of state doctrine in this case. See Appendix, *infra*.

In this case, respondents' repudiation of a commercial obligation is nothing more than a claim to be free of the responsibilities imposed by commercial law, a claim that the United States has rejected as a matter of official policy. No embarrassment arises from a court's enforcement of that policy. No embarrassment arises from a court's refusal to give legal effect to a foreign state's repudiation of the rule of law in commercial affairs.

iii. None of the other concerns giving rise to the act of state doctrine are present here either. In *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 432–434, this Court expressed the view that the application of customary international law to state acts of expropriation might lead to commercial disruption and piecemeal dispositions of claims against foreign states. But here, commercial disruption would arise only from judicial acceptance of the state act; judicial deference to a foreign state's repudiation of its com-

[18] Accordingly, application of the act of state doctrine here could in no way infringe upon "the basic relationships between branches of government in a system of separation of powers." *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 423.

mercial obligations would effectively remove the state's commercial transactions from the rule of law, with all the consequent potential for disruption that such a removal would entail. Similarly, such deference, by subjecting private litigants to the whim of the foreign state on a case-by-case basis, would make inevitable a patchwork approach in the resolution of commercial claims against foreign states. See *id.* at 432.[19]

b. Finally, there are strong affirmative reasons, which are implicit or explicit in what has already been said, for refusing to afford the protection of the act of state doctrine to a foreign state's mere repudiation of its commercial liabilities. We merely summarize those reasons here.

Under the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of "acts of state" would frustrate this modern development by permitting sovereign immunity to re-enter through the back door, under the guise of the act of state doctrine. But since the commercial acts themselves should not be entitled to the protection of the act of state doctrine, *a fortiori* the repudiation of the liabilities arising from those acts should be unprotected. It would, moreover, be especially incongruous to permit

[19] Moreover, there would appear to be no significant likelihood that the entry of judgment in commercial litigation would adversely affect the diplomatic claims process. Cf. 376 U.S. at 431–433.

a foreign state that institutes suit here, as respondents have done, in order to enforce rights derived from its commercial activities, to preclude full adjudication of the controversy by claiming the protection of the act of state doctrine for its bald repudiation of counterliability.

The United States has a positive interest in the full adjudication of the rights and duties arising out of the commercial acts of foreign states. With the growing participation of foreign governments and their instrumentalities in international commercial trade, there has been a significant increase in the commercial interaction between American businesses and state-owned foreign enterprises. See, *e.g., International Economic Report of the President, supra,* at 56. It is in the interest of the United States that such commercial interaction be subject to the rule of law. The United States also has a more specific interest in being able to enforce its own laws against foreign-state enterprises engaged in commercial activities having substantial contacts with the United States. Cf. ALI, *Restatement (Second), Foreign Relations Law of the United States, supra,* § 18 at 52 (Comment i); *Steele* v. *Bulova Watch Co.,* 344 U.S. 280; *United States* v. *Sisal Sales Corp., supra; United States* v. *Aluminum Co. of America, supra.* Application of the act of state doctrine to the purely commercial, nongovernmental acts of a foreign state, or to the foreign state's repudiation of obligations arising from such acts under applicable commercial or regulatory law, would effectively remove foreign states' commercial dealings from the realm of law. This Court should not sanction that result.

This is not to say that we believe that the act of state doctrine is to be selectively applied on a case-by-case basis. To the contrary, we believe that adherence to fixed decisional principles here, as elsewhere in the law, is desirable in order to minimize uncertainty and the disputes to which such uncertainty frequently gives rise. Our position, therefore, is not simply that nonapplication of the act of state doctrine here is appropriate because "an exercise of jurisdiction [in this particular case] would [not] interfere with delicate foreign relations conducted by the political branches" (*First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 775 (concurring opinion of Mr. Justice Powell)), but rather that state commercial acts, and state repudiations of obligations arising out of such acts, as entire categories of state activities, are outside the protection of the act of state doctrine. Accordingly, we find it unnecessary to discuss the broader question whether, contrary to this Court's decision in *Banco Nacional de Cuba* v. *Sabbatino, supra,* American courts should adjudicate the validity of other foreign state acts, *i.e.,* acts unrelated to commercial transactions, under customary international law.[20]

[20] We are advised by the Department of State, however, that such adjudications would not embarrass its conduct of foreign relations. See Appendix, *infra.*

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it denies petitioner full recovery on its counterclaim.

Respectfully submitted.

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Solicitor General.
REX E. LEE,
Assistant Attorney General.
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DECEMBER 1975.

APPENDIX

THE LEGAL ADVISER,
DEPARTMENT OF STATE,
Washington, November 26, 1975.

DEAR MR. SOLICITOR GENERAL:

In the case of *Alfred Dunhill of London, Inc.* v. *The Republic of Cuba,* which is before the Supreme Court on petition for a writ of certiorari, No. 73-1288, the Court has requested the parties to discuss whether its holding in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, should be reconsidered.

The Department of State believes that the question of whether the *Sabbatino* case should be reconsidered involves matters of importance to the foreign policy interests of the United States and requests that its views be conveyed to the Supreme Court.

The views expressed herein are in addition to the arguments presented in the brief amicus curiae which the United States is filing in the *Dunhill* case. As urged in that brief, we do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial, and not public, in nature. Moreover, since 1952, the Department of State has adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations, and that such adjudications are consistent with international law on sovereign immunity.

In the event, however, that the Court reaches the question whether the *Sabbatino* holding should be reconsidered, we believe that the following considerations should be called to the Court's attention:

Since *Sabbatino* was decided in 1964, the Department of State has on two occasions expressed to courts in the United States its views concerning act of state adjudications. First, in the *Sabbatino* case itself, on remand, the Executive Branch declined to make a determination under the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2), "that application of the act of state doctrine is required in this case by the foreign policy interests of the United States." *Banco Nacional de Cuba* v. *Farr*, 272 F. Supp. 836, 837 (S.D.N.Y.), aff'd, 383 F. 2d 166 (C.A. 2), certiorari denied, 390 U.S. 956. Having taken note of the Executive Branch's position, the district court in *Farr* applied the Hickenlooper Amendment and held that a Cuban decree of confiscation violated customary international law. 272 F. Supp. at 838.

Second, in *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, the Department of State informed the Supreme Court that general foreign relations considerations did not require application of the act of state doctrine to bar adjudication of a counterclaim when the foreign state's claim arises from a relationship between the parties existing when the act of state occurred, and when the amount of relief to be granted is limited to the amount of the foreign state's claim.[1] Relying on the precedent of

[1] Since *First National City Bank* was decided, the Department of State has taken the position in the sovereign immunity area that even where a counterclaim exceeds the foreign state's claim, the courts may adjudicate the counterclaim if it arises from the same "transaction or occurrence that is the subject matter of the claim of the foreign state." S. 566, 93d Cong., 1st Sess., § 1607(1); see,

Bernstein v. *N. V. Nederlandsche Amerikaanshe, Etc.,* 210 F. 2d 375 (C.A. 2), where the Department had advised that the act of state doctrine need not apply to a class of cases involving Nazi confiscations, the Department in *First National City Bank* concluded that the act of state doctrine need not be applied "in this or like cases."

Significantly, the *Farr, Bernstein* and *First National City Bank* cases each involved an Executive Branch determination which opened the way for U.S. courts to review an act of state on the merits under international law. In each of these cases, the claim or counterclaim in question alleged that an act of state violated customary international law. Thus, at least on a case-by-case basis, the trend in Executive Branch pronouncements has been that foreign relations considerations do not require application of the act of state doctrine to bar adjudications under international law.

This trend is mirrored in other countries. Apart from the cases cited by Mr. Justice White in *Sabbatino,* 376 U.S. at 440 n. 1, there have been several recent decisions where foreign courts have reviewed state acts under international law.[2] English law, from which our act of state doctrine derives, does not re-

ALI, Restatement, Foreign Relations Law of the United States, Second, § 70(2)(b). In our view, the adjudication of counterclaims against a foreign state, arising from the same transaction, occurrence or subject matter as the claim of the foreign state, does not pose foreign relations difficulties.

[2] See e.g., *In The Matter of Minera El Teniente, S.A.*, 12 Int'l Legal Materials 251 (Superior Ct. Hamburg, 1973) (a foreign state's act of expropriation that violates international law will not be recognized by German courts if the subject matter of the litigation has a substantial contract with Germany); *Braden Copper Company* v. *Le Groupement d'Importation des Metaux*, 12 Int'l Legal Materials 187 (Ct. of Extended Jurisdiction Paris, 1972)

quire British courts to abstain from reviewing state acts under international law.[3] As far as can be determined, this exercise of the judicial function in foreign jurisdictions has not caused serious foreign relations consequences for the countries concerned.

The present case is similar to *Bernstein, Farr* and *First National City Bank*. This Department is of the opinion that there would be no embarrassment to the conduct of foreign policy if the Court should decide in this case to adjudicate the legality of any act of state found to have taken place and to make such

(rejecting sovereign immunity of a state trading company that marketed expropriated copper); *Compagnie Francaise de Credit et de Banque* v. *Consorts Atard*, Clunet, J. de Droit Int'l, 98 (1971), p. 86 (France: Cour d'Appel Amiens, 1970) (foreign expropriation decrees will not be recognized in France absent the payment of prompt, adequate and effective compensation); *Credit Foncier d'Algerie et de Tunisie* v. *Narbonne*, Clunet, J. du Droit Int'l 96 (1969), p. 912 (France: Court de Cassation, 1969) (acts of expropriation not recognized in France unless equitable compensation is first determined); *Obester Gerichtshof* (Austrian Supreme Court), decision of 22 December 1965, Osterr. Juristenzeitung 21 (1966), p. 204, Clunet, J. du Droit Int'l, 94 (1967), p. 941 (an expropriation without compensation violates international law, but no recovery against purchasers of expropriated property); *N.V. Assurantie Maatschappij de Nederlanden van 1845* v. *P. T. Escomptobank*, 33 Int'l L. Rep. 30 (D. Ct. The Hague, 1962) (rejecting act of state defense where there is a violation of international law).

[3] *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140, 50 T.L.R. 284; *Re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 346; 1 Lauterpacht, *Oppenheim's International Law*, 267–68 (8th ed. 1955). See also, *Republic of Peru* v. *Peruvian Guano Co.*, [1887] 36 Ch. D. 489 and *Republic of Peru* v. *Dreyfus Brothers & Co.* [1888] 38 Ch. D. 348, where British courts, under international law, refused to give effect to Peruvian laws annulling acts of the preceding Peruvian government; cf. *Buttes Gas and Oil Co.* v. *Hammer* [1975] 2 W.L.R. 425 at 434–35.

adjudication in accordance with any principle of international law found to be relevant.

In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.

Sincerely,

MONROE LEIGH.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

—against—

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the

Supreme Court of the United States

October Term, 1975

No. 73-1288

Alfred Dunhill of London, Inc.,

Petitioner,

—against—

The Republic of Cuba and Daniel Solano Pinera,
as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Introduction

Respondents submit this brief in response to that for the United States as *amicus curiae*, filed after the briefs on reargument had been filed by the parties hereto.

I.

Responding to the Solicitor General's Brief

A.

The Solicitor General has come forward with a position never before advanced by either the State Department or

the Justice Department—a position which would constitute a major innovation in our law. He urges that there exists or should exist a "commercial" exception to the act of state doctrine directly analogous to a similar exception to the doctrine of sovereign immunity as set forth in the "Tate Letter," 26 Dept. State Bull. 984 (1952). So far as we can ascertain from the brief submitted by the Solicitor General, the United States is not at all concerned about whether petitioner or respondents prevail on this petition.[1] If we read the Solicitor General's brief correctly, the only interest the government has in this case is to avoid a decision based upon the broad proposition that in a "commercial" transaction a sovereign may always avoid an obligation by a "naked repudiation" of it. Br. p. 14.[2]

There is no reason for this Court to face the issue posed by the Solicitor General—in fact there is good reason for the Court not to face it. So major a change in our law should await a case in which the issue is squarely presented by the record. It is not so presented in this case. As we have pointed out repeatedly, this is not a "mere commercial transaction" and the respondent has not made a "naked repudiation" of any commercial obligation. There is no reason for the Court to "assume", with the Solicitor General, "that respondents in fact have repudiated a [commercial] obligation to make restitution to the importers", Br. p. 12; such is not the case.

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[1] After referring to respondents' contention that they had a legal entitlement to hold the monies in question on the basis of the 1960 decree of intervention, the Solicitor General says, Br. p. 11, "We take no position on the merits of this contention".

[2] See also Govt. Br. p. 16, where it is argued that a "mere repudiation of a commercial obligation" should not be given act of state protection and, to the same effect, see pp. 26, 28 and fn. 13 at p. 30.

At the risk of some repetition, we take the liberty of reviewing briefly the record facts relevant to the discussion at hand.

In September, 1960 the Cuban Government intervened (or nationalized) tobacco enterprises owned by Cuban nationals. That decree purported to nationalize not only the physical properties in Cuba but also the accounts receivable of the intervened firms. When, in the ensuing few weeks the petitioner made payment of those accounts to the interventor, the latter accepted those payments as belonging to him under the intervention decree. Such was his contention in 1960 when the intervention decree was promulgated and the money received, in 1969 when this case was tried in the district court, in 1973 when it was argued in the Court of Appeals, and today.

In *Palicio* v. *Brush & Bloch*, 256 F.Supp. 481 (1966), *aff'd* 375 F.2d 1011 (1967), *cert. den.* 389 U.S. 880, the issue related to payment for post-intervention shipments, and the court held that, pursuant to the intervention decree, the interventors were entitled to payment for such shipments. There has since been no dispute about that. In the course of the litigation, passing mention was made of the possibility that there might be some small amounts due for pre-intervention shipments, and in order to avoid extensive litigation over the right to a sum of money which seemed to be *de minimis*, respondents agreed that the former owners were entitled to such payments. This agreement (which the government now refers to as possibly having the effect of *res judicata*— see Govt. Br. p. 11), was quite properly disregarded by Judge Bryan in this case. He had presided over the proceedings in *Palicio* and was fully aware of the circumstances under which that stipulation was made—indeed the circumstances are reflected in his opinion in *Palicio* v. *Brush & Bloch, supra* at 489, fn.

8 as well as in his opinion in this case. J.A. 43a. It is hard to see the *Palicio* agreement as a meaningful waiver of rights which should be held to bind the parties and both the District Court and the Court of Appeals made their decisions without reliance thereon.

It was not until 1968, when this case was being prepared for trial, that the extent of the former owners' claim for pre-intervention shipments became apparent. Up to that time petitioner's contention (repeated in its petition for certiorari now pending undetermined before this Court, *sub nomine Saks & Co. et al.* v. *Republic of Cuba,* No. 73-1289) was that it had fulfilled its obligation to the former owners by making payment to the interventor with the knowledge of and without objection from the former owners who, it was argued, had waived any rights they might have had by their silence. It was not until trial that petitioner argued that if such payments were held insufficient to satisfy the debt to the former owners, petitioner was entitled to receive an equivalent amount from the respondents. Indeed, petitioner's pleadings had made no such claim and a cause of action against respondents was not pleaded until the end of the trial, when petitioner's answer was amended. (Trial minutes, pp. 799-801). There had been no previous demand by petitioner upon the respondents for the return of the payments. (Trial minutes, p. 799).

Counsel for respondents, in making his closing argument at the District Court level, made respondents' position perfectly clear: the funds in question were claimed under authority of the intervention decree.[3] In the Court of Appeals respondents made the same argument.

[3] Counsel said in that argument, at pp. 854-856 of the Trial Transcript:

"... [T]he result is the same, regardless of whether Cuban law governs or New York law governs. If it is Cuban law that governs, I assume the issue is clear enough, the money went to Cuba, the interventors had seized and were entitled to seize the bank accounts of the owner-plaintiffs, as this money came in, they accepted this money, and under Cuban law I don't think it will be argued that they were [not] entitled to it, if the law of Cuba governs.

"But suppose the law of New York governs. Well, what is the law of New York? The law of New York is the act of state doctrine. And under the act of state doctrine the Cuban government, in accepting, expropriating, seizing, nationalizing, whatever other words you want, to take this money, has done so pursuant to a regulation, a law, a decree of the government of Cuba, and therefore the courts of this state will not look into the matter nor will the federal court.

"Now, I am not talking about the extraterritorial effect of an act of state. I am talking about a territorial effect, namely, the seizure or the acceptance or the appropriation of this money when it got down to Cuba. We are not now concerned with whether they expropriated debts on September 15th. The question is what happened on October 1st, and October 15th and on November 8th and December 12th, when the money came down. And at that time the Cuban government took this money and under the act of state doctrine it belongs to the Cuban government."

As an additional argument, respondents contended in both the District Court and the Court of Appeals, that since ". . . a breach of contract [is] considered an act of state both in the federal courts and in our court", *French* v. *Banco Nacional,* 23 N.Y.2d 46 at 66 (1968) the refusal to acquiesce in the quasi-contractual obligation sought to be imposed by a foreign court, was *a fortiori* an act of state.

Even under this alternative theory respondents did not claim and do not claim now that a "naked repudiation" or a "mere refusal to pay" constitutes an act of state, because we do not see that on the record any such issue is raised. The "refusal" or "repudiation" in question was not an effort by a "tobacco merchant" to avoid an ordinary commercial debt arising out of trade in cigars. It occurred in the context of the intervention decree.

Thus the government's arguments are irrelevant in this case. Nevertheless we feel that its brief should not go without answer since it does raise an issue of considerable importance. We suggest that the government's analysis is at fault in a number of respects.

B.

The Solicitor General's distinction between "commercial" and "public" acts of sovereign is drawn from the field of sovereign immunity. The experience with the distinction there is not such as to justify its extension to the act of state doctrine. The restrictive theory of sovereign immunity was first set forth in the Tate letter, 26 Dept. State Bull. 984 (1952), and as originally promulgated was a self-imposed guide announcing the general policy to be followed by the State Department in considering requests made by litigants for a suggestion of immunity. The distinction made by the Tate letter between *jure imperii* and *jure gestionis*, inadequately defined in the original letter, has proven to be quite unworkable. For example, the Solicitor General considers that a contract by a sovereign to purchase clothing for its army is a commercial act (Govt. Br. p. 30, fn. 13), a result which the Court of Appeals termed "astonishing" in *Victory Transport Inc.* v. *Comisaria General*, 336 F.2d 354 at 359 (2d Cir. 1964), *cert. den.* 381 U.S. 934. And Judge Weinfeld only last year held that the purchase of goods for the use of the armed forces was entitled to a grant of immunity. *Aerotrade, Inc.* v. *Republic of Haiti*, 376 F.Supp. 1281 (S.D.N.Y. 1974). As the court points out in *Victory Transport, supra*, many commentators are of the opinion that the distinction is impossible of application.[4] In practice the Tate letter distinction has been followed or ignored by the State Department as called for by the foreign policy requirements of the United States. See, for example, *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198 (2d Cir. 1971), *cert. den.* 404 U.S. 985; *Spacil* v. *Crowe*, 489 F.2d 614 (5th Cir. 1974); *Rich* v. *Naviera Vacuba*, 197 F.Supp. 710 (E.D. Va. 1961), *aff'd.* 295 F.2d 24 (4th Cir. 1961).

[4] In addition to the authorities cited by Mr. Justice Brennan in footnote 13 of his dissent in *First National City Bank* v. *Banco Nacional*, 406 U.S. 759 at 780, and by the Court in *Victory Transport*, see Falk, *The Immunity of Foreign Sovereigns in United States Courts*, 6 N.Y.U. J. Int'l. Law and Politics 473, 477 (1973).

The *Rich* case is particularly instructive. In that admiralty action the State Department filed a suggestion of immunity to bar prosecution of claims clearly *jure gestionis* —for example, suits on judgments obtained by longshoremen for injuries sustained while performing services for the former owner of the ship; a claim for fuel and necessaries furnished to vessels owned by Naviera in 1959; and a claim for wages for members of the crew of the ship. When libellants relied upon the Tate Letter and its restrictive theory of immunity as justification for their claims, the District Court honored the State Department's suggestion of immunity, stating "No policy with respect to international relations is so fixed that it cannot be varied in the wisdom of the Executive. Flexibility, not uniformity, must be the controlling factor in times of strained international relations." 197 F.Supp. at 724.

The distinction between *jure imperii* and *jure gestionis* was totally inadequate to meet the exigencies of the situation in the *Rich* case. More than that, there is no hint in the opinions of the district court and the Court of Appeals, nor so far as we know, in the court records in the case, of the serious and critical political issues which lay behind

the entire episode.[5] In *Spacil* v. *Crowe, supra* at 619-621, the court elaborated upon the dangers in requiring even a statement of reasons for Executive action. *Cf., Aerotrade Inc.* v. *Republic of Haiti, supra* at 1284-1285.

The courts, dissatisfied with the undefined standards of the Tate letter, have attempted refinements of the *jure imperii* and *jure gestionis* distinction, most notably in *Victory Transport, Inc.* v. *Comisaria General,* 336 F.2d 354, 365 (2d Cir. 1964), *cert. den.* 381 U.S. 934. There the court sought to define those cases in which sovereign immunity would be granted by setting forth a list of imprecise categories. Even so, the court, evidently sensitive to the inadequacy of its formulation, found it necessary to leave an escape hatch, saying at 360:

> "Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement."

Indeed, the failure of restrictive immunity to safeguard against untoward political consequences has been sufficiently recognized so that both the State Department and the courts have agreed that, even after suit against a sovereign, execution of a resulting judgment upon the foreign

[5] The matter is treated *in extenso* in Chayes, Erlich and Lowenfeld, 1 INTERNATIONAL LEGAL PROCESS 87-144. As appears from that discussion, the very day before the lawsuit arose the Cuban government had returned to the United States an Eastern Airlines plane which had been hijacked, following upon a promise by the United States that it would return vessels illegally brought into the United States.

sovereign's property is not permitted. Absolute immunity from execution has been retained.[6]

The defects in the restrictive theory would be greatly enlarged if applied to the act of state doctrine. The Solicitor General seeks to assimilate the sovereign immunity doctrine to that act of state as though the two doctrines were opposite sides of the same coin. We suggest that this is not so. The act of state doctrine is more complex and serves more and different concerns. *First National City Bank* v. *Banco Nacional,* 406 U.S. 759, 773 (Powell, J. concurring), 789, fn. 13 (Brennan, J. dissenting).

The grant or denial of sovereign immunity relates only to whether a domestic court will accept jurisdiction of a case against a foreign sovereign, thus possibly incurring its ill-will to a greater or lesser extent. A grant or denial of immunity implies no finding one way or the other on the merits or even that the merits will be reached. The granting of immunity forecloses judicial consideration of the merits; its denial merely allows the suit to proceed on the merits of the claim including any defenses the sovereign may have such as the act of state doctrine.

The act of state doctrine, on the other hand, necessarily goes to the merits. Absent the doctrine, our courts

[6] See Department of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 267 (1974); Note, *Sovereign Immunity,* 54 Am. J. Int'l. Law 640, 643 (1960); *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrlsen,* 43 F.2d 705 (2d Cir. 1930), *cert. den.* 282 U.S. 896; *New York and Cuba Mail Steamship Co.* v. *Republic of Korea,* 132 F.Supp. 684 (S.D.N.Y. 1955); *United States* v. *Guaranty Trust Co.,* 60 F.Supp. 103, 105 (S.D.N.Y. 1945); *Et Ve Balik Kurumu* v. *B.N.S. Int'l. Sales Corp.,* 25 Misc. 2d 299, 204 N.Y.S. 2d 971 (Sup. Ct., N.Y. Co. 1960), *aff'd.* 17 A.D. 2d 929, 233 N.Y.S. 2d 1013 (1st Dept. 1962); *Weilamann* v. *Chase Manhattan Bank,* 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct., Westchester Co. 1959).

would be required to pass judgment on the legality *vel non* of the acts of a foreign sovereign. At this level the possibility of "embarrassment" becomes critical.

The Solicitor General persists in treating the question of embarrassment as a matter affecting only the relations between foreign states and the United States government, and in its brief constantly poses the problems of possible embarrassment to our foreign relations should a court hand down a decision in favor of United States interests and against those of a foreign sovereign (*e.g.*, Br pp. 16, 39). We should have thought that, by this time, a reading of the opinion of the court in *Banco Nacional* v. *Sabbatino*, 376 U.S. 398, 432-433 and of the dissenting opinion in *First National City Bank* v. *Banco Nacional, supra* at 759, 777, 778, should have made it clear that a much more important element of embarrassment arises out of the possibility that the court may decide *in favor of* the foreign government and against the position taken by the State Department so that the judiciary will "become embroiled in the politics of international relations to the damage not only of the courts and the Executive but of the rule of law". *First National City Bank* v. *Banco Nacional, supra* at 778 (Brennan, J. dissenting).[7]

[7] See also the comments of former Attorney General Katzenbach on the famous *Rose Mary* decision, *Anglo Iranian Oil Co.* v. *Jaffrate*, [1953] 1 Weekly L.R. 246; 1953 Int'l. L.Rep. 316. That case arose out of the nationalization by Iran of oil wells belonging to a British owned company and the litigation involved title to the oil taken from those wells. A ship carrying the oil was attached while in the Port of Aden and the Colonial Court held that the nationalization did not effectively pass title. Mr. Katzenbach says:

> "The English government had unequivocally expressed and widely circulated its views—what the court [in Aden] called its 'public policy'—with regard to the 'illegality' of the Iranian nationalization decree; as an incident of diplomatic pressure, it was clearly desirable from the government's point of view to limit the salability of Iranian oil in the world market. That the English court could have responsibly ignored this policy is inconceivable." Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087 at 1155 (1956).

It may be that the restrictive theory of sovereign immunity will compel the judiciary, on occasion, to reach issues which it should not. We regard this as unfortunate, but perhaps it is a necessary consequence of the restrictive theory.[8] But at least such occasions will be limited to situations in which the acts of the foreign sovereign have been outside its territory; as to acts done within the sovereign's territory, the court can still rely on the act of state doctrine. There is likely to be less offense to a foreign sovereign when the court of the forum passes upon the sovereign's attempt to exercise extraterritorial power. And the dangers are further mitigated, to a degree, by the State Department's ability, under *Ex Parte Peru*, 318 U.S. 579 to exercise an unlimited discretionary authority to preclude adjudication, as in the *Rich* and *Spacil* cases. But no such discretionary authority exists, nor can it exist, in the application of the act of state doctrine because no authority can or ought to be given the discretionary and unreviewable power to thrust a court into the midst of a controversy which is political in its nature. Nor can the court itself guard adequately against embroilment in a political question. A court will not have and under normal conditions cannot possibly get all of the data necessary to determine such questions and the very quest for information may itself create political issues. Furthermore, the judiciary is not delegated the task under our Constitution to consider or decide such questions and is not competent to do so.

[8] The restrictive theory of sovereign immunity has never been passed upon by this Court.

In the situation hypothesized by the Solicitor General, the dangers inherent in every controversy concerning the acts of a foreign sovereign are greately increased. A rule of law which provides that a sovereign will not be permitted to avoid a commercial obligation through a "naked repudiation" clothed as an act of state is superficially appealing. After all, why should not a foreign nation be required to live up to its commercial obligations the same as any one else?

Such a view is simplistic. We live in a complex world where food and oil may sometimes be as potent a weapon as tanks and guns. We have seen in the past few years many instances in which great political issues were raised, not by marching armies but by transactions which to a casual observer might appear commercial. The withholding of oil by Middle East oil producers, the sale of wheat by the United States to the Soviet Union, the attempted world-wide embargo of Chilean copper—all of these are illustrative of commercial transactions with very profound political implications.[9]

Indeed, it is likely that the more "naked" the repudiation, the more political the background. As we pointed out in our Brief on Reargument, p. 11, nations like the respondent Cuba can exist only through trade, and a repudiation of a commercial obligation is most unlikely unless there are reasons for it—either commercial or political reasons. Pleas of act of state are not and can never be part of the normal arsenal of a trading nation. It is only in the unusual case, and we suggest primarily in the political case, in which this defense is called upon.[10]

[9] See *Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106, 112 (2d Cir. 1966), *cert. den.* 385 U.S. 898: "Hard currency is a weapon in the struggle between the free and the Communist worlds."

II.

Responding to the Legal Adviser's Letter

We assume that the letter from the Legal Adviser, appended to the Solicitor General's brief, is intended as the most recent of the "Bernstein" letters[11] and we urge that insofar as it goes beyond that brief, it should be disregarded for the reasons given by six Justices of this Court in *First National City Bank* v. *Banco Nacional, supra* at 772, 773, and 776.

[10] The Solicitor General's further proposal to modify the act of state doctrine's territorial requirement is also misconceived. As the government acknowledges, Br. p. 31, that requirement has never been thought to be a shorthand for the proposition that the doctrine should apply only "where under commonly accepted conflict principles, the substantive law of the foreign state controls the adjudication of the merits of the dispute". On the contrary the territorial requirement "rests on the deeply embedded postulate in international law of the territorial supremacy of the sovereign, a postulate that has been characterized as the touchstone of private and public law", *Sabbatino, supra* at 445 (White, *J.*, dissenting). There is no need to import into the act of state doctrine concepts of conflicts of law which may be irrelevant to the basic postulate of which Mr. Justice White speaks.

Even by the government's test, the act of state here was performed within the territory of Cuba. Certainly if, as we have contended, the intervention decree and the consequent appropriation of funds as they came into Cuban territory was the act of state in question, the act took place within the territory of Cuba, and there is nothing in the law of conflicts to the contrary. Even if the transaction be viewed as the "naked repudiation" of a debt (commercial or otherwise), it is clear that the debt had its situs in Cuba, that the repudiation took place in Cuba and that even if we apply commonly accepted conflict principles, the relevant transaction took place in Cuban territory. See the Court of Appeal's opinion, J.A. 23a-24a.

[11] *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954).

There are additional considerations which compel a rejection of the "Leigh" letter:

(1) As we have already shown, this is not a commercial transaction.

(2) As we have also shown elsewhere, there is no question of international law in this case and hence no occasion to reconsider the *Sabbatino* decision. See respondents' Brief on Reargument, pp. 1-11.

(3) As we have also shown, even if there were reason to reconsider the *Sabbatino* decision, that decision should be reaffirmed. See respondents' Brief on Reargument, pp. 12-13. The Legal Adviser does not respond to our discussion or even refer to it.

(4) The Legal Adviser's position is contrary to that taken by the State and Justice Departments in the *Sabbatino* litigation and thereafter. See Brief for the United States as *Amicus Curiae* in *Sabbatino*. See also Hearings before the Committee on Foreign Affairs, House of Representatives, 89th Congress, First Session, on H.R. 7750 (1965), pp. 991, 1033, 1060, 1234; Hearings before the Senate Committee on Foreign Relations, 88th Congress, Second Session on S.2659, 2660, 2662 and H.R. 11380 (1964), pp. 449, 618. There the United States maintained that an international law exception to the act of state doctrine would seriously prejudice the conduct of foreign relations and urged its rejection. That succeeding administrations have differed so greatly in their assessment of the needs of foreign policy, and of the proper role of the judiciary in our governmental structure, emphasizes the wisdom of the view that it is the judiciary alone which must define the contours of the act of state doctrine and determine its application.

(5) The rule suggested by the present Legal Adviser is categorical and unrelated to any specific case or set of circumstances. It would preclude the "balancing of interests" and "careful examination of the facts in each case" found appropriate by Mr. Justice Powell in *First National City Bank* v. *Banco Nacional, supra* at 774-776.

We find it particularly surprising that the Legal Adviser should have so blandly made the determination "that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations" (Govt. Br. p. 45); it is difficult to see how any responsible government official could have made such a statement in the face of recent experiences in cases like *Rich* v. *Naviera Vacuba, supra,* and *Spacil* v. *Crowe, supra.* Similarly, this Court cannot credit an assertion that the Legal Adviser or anyone else can foresee every instance in which the validity of an act of state under international law may be placed in issue and the consequences of adjudication thereof.

The Leigh letter in this respect differs markedly from its predecessors. The Legal Adviser's opinion in the *Bernstein* case, *supra,* and the letter of Mr. Stevenson in *First National City Bank* v. *Banco Nacional, supra,* were all carefully confined to a narrow set of known circumstances and made no effort to legislate broadly in this most complex field.[12]

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[12] We are not impressed by the Legal Adviser's reference in fn. 2 of his letter (Govt. Br. p. 47) to cases in foreign jurisdictions and particularly to the cases which related to the Chilean expropriation of United States owned property. We suggest that in those cases the courts were, wittingly or unwittingly, performing a political function in enforcing a blockade against the democratically elected government of Chile, in precisely the same way that the government of Great Britain enforced its economic blockade upon the Mossadegh government in 1953. See *ante,* p. 10 fn. 7. Hindsight teaches us that perhaps it would have been better for the maintenance of the independence of the judiciary and respect for the rule of law had the German and French courts stayed out of the Chilean controversy. In view of the recent disclosures respecting the role of the Executive Branch of our government in Chile during the Allende government, we may be thankful that the same issue was never squarely presented to our courts and that, if it had been, we had available the *Sabbatino* doctrine to avoid the consequent embarrassment to the judiciary.

CONCLUSION

For the reasons stated in this and prior briefs, the Writ of Certiorari was improvidently granted and should be dismissed. Alternatively, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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